United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF OF APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,984

ALBERT C. FROST, ET AL.,
Appellants

v.

COOPER P. BENEDICT, ET AL.,
Appellees

On Appeal From the United States District Court For the District of Columbia

FRANK F. ROBERSON
JEREMIAH C. COLLINS
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Attorneys for Appellants

Of Counsel:
HOGAN & HARTSON

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

STATEMENT OF QUESTION PRESENTED

Whether the trial court erred in failing to grant appellants' motion for judgment notwithstanding the verdict in an action for damages for personal injury and property damage arising out of an automobile collision when the evidence conclusively demonstrated that appellees' negligence contributed to the accident and appellant, despite a determined effort to avoid the accident, did not have a last clear chance to avert the collision.

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TABLE OF CASES

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* Cases chiefly relied upon are marked by asterisks.

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Appellees.

On Appeal From the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from a final judgment in an action for damages for personal injuries following a verdict in favor of appellee, Betsy Ann Siegeltuch.[1] Jurisdiction of this

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[1] At the time of the accident appellee Betsy Ann Siegeltuch was operating an automobile owned by appellee Cooper P. Benedict. It was stipulated that the resolution of the action of appellee Benedict was to be determined by the final result in the action of appellee Betsy Ann Siegeltuch (J.A. 19A). Accordingly, hereinafter the use of the term appellee shall refer only to Betsy Ann Siegeltuch.

Court to hear the appeal is predicated upon United States Code, Title 28, Section 1291.

STATEMENT OF CASE

Appellee Betsy Ann Siegeltuch sued appellants for damages for personal injuries sustained by her in an automobile accident occurring on June 29, 1960, at the intersection of Yuma and 36th Streets, N.W., in this city (J.A. 3A, 4A). The accident happened at about 6:30 p.m. (J.A. 7A). It was or had been raining and the streets were wet (J.A. 7A). Appellee was traveling in a westerly direction on Yuma Street (J.A. 7A). Travel on Yuma Street at the intersection in question was governed by a stop sign (J.A. 7A). Appellant, Hugh Frost, was operating his father's automobile, a Mercury, in a southerly direction on 36th Street (J.A. 7A). No traffic control device governed his travel. Yuma Street was 30 feet wide and 36th Street was approximately 26 feet wide(J.A. 23A). The collision between the two automobiles occurred in the intersection at a point 7 feet south of the north curb of Yuma Street and 11 feet west of the east curb of 36th Street (J.A. 23A). The evidence disclosed that appellant applied his brakes in an effort to avoid the collision but slid 35 feet on the wet pavement into appellee's automobile (J.A. 23A). Appellee did not apply her brakes nor did the evidence disclose that she did anything to avoid the accident (J.A. 23A). Her vehicle traveled 39 feet after impact, coming to rest against the stop sign on Yuma Street on the opposite side of the intersection from which she had entered (J.A. 24A). Appellant traveled 24 to 27 feet after impact, coming to rest within the intersection near the south curb line of Yuma Street (J.A. 24A).

Appellee testified that she did not recall the circumstances of the accident (J.A. 50A). There were no passengers in her automobile.

Appellant, Hugh Frost, testified that he observed appellee's automobile when both vehicles were approximately 100 feet from the intersection (J.A. 54A). When he was approximately 50 or 60 feet from the intersection traveling at approximately 25 miles per hour, he realized that appellee was not going to stop for the stop sign (J.A. 55A, 59A). He applied his brakes immediately but skidded on the wet pavement into appellee's car (J.A. 55A). He testified that appellee had not stopped for the stop sign (J.A. 55A).

There were three passengers in appellant's automobile: His sister; his sister's friend, Gwyn Spring; and, appellant's friend, James Baden. His sister was unable to testify as to the accident or its circumstances. Gwyn Spring testified that she first saw the appellee's car when both of the automobiles were approximately a third of a block from the intersection (J.A. 63A). She watched appellee's automobile up to the accident and stated that it never stopped for the stop sign (J.A. 63A). James Baden said that he first saw appellee's automobile when appellant was approximately 30 feet from the intersection and traveling about 25 miles per hour (J.A. 66A). Appellee, he testified, was, at that time, at the stop sign (J.A. 66A); coming through the stop sign (J.A. 66A).

The witness, B. Manly Parkes, a West Point cadet, who did not know the parties or other witnesses to the accident testified by way of deposition (J.A. 70A). He was operating an automobile in an easterly direction on Yuma Street and believes he was approaching the stop sign or stopped at the stop sign governing his travel on Yuma Street when he witnessed the accident (J.A. 71A). He testified that when appellee's automobile shot into the intersection (J.A. 77A) appellant was in a collision course (J.A. 72A). It didn't appear to him that appellee had seen appellant's car because ". . . a sane person wouldn't pull out in front of an oncoming car so that the car would hit her" (J.A. 76A).

One Roy Ostrom, engaged by appellee's attorney a couple of days before trial, was asked his opinion as to what appellant's skid marks meant to him (J.A. 33A, 34A). Despite the fact that he did not know how much it had rained nor how wet the streets were and did not think it important; despite the fact that it was immaterial to him whether appellant was driving a Volkswagon or a truck or a Mercury; despite the fact that he had not ascertained the grade of the street; despite the fact that he had not inspected the appellant's vehicle or its tires; and, despite the fact that he was of the opinion that the street involved was of an asphalt surface as opposed to the investigating police officer's testimony that it was macadam surfaced: he was of the opinion, and so testified, that the skid marks indicated to him that appellant was traveling at a minimum speed of 35 miles per hour; that appellant observed danger at a point 72½ feet from the point of impact; that appellant immediately undertook to avoid the accident by forcefully applying his brakes; and, that an average reaction time was ¾ of a second during which appellant as a normal human being was to travel 37½ feet of the 72½ feet to the point of collision before his brakes could be brought into play (J.A. 36A, 37A, 38A, 40A, 46A, 47A, 48A). Appellant was in a skid on the wet surfaced highway the last 35 feet.[2] This witness was not asked how much time elapsed between the time appellant first observed danger and the accident nor was he asked whether appellant had enough time to have done anything more than he did to avoid the accident. Nevertheless, this case was submitted to the jury upon the doctrine of last clear chance because it was appellee's theory that, although she had done nothing to avoid the accident after ignoring the stop sign, appellant

[2] This witness was also of the opinion that if appellant had observed danger at a point 72½ feet from the point of impact and that if appellant had been traveling at 25 miles per hour that he could have brought his vehicle, whether truck or small car, to a stop 3 feet short of impact (J.A. 41A).

in addition to applying his brakes could and should have swerved or sounded his horn. (J.A. 79A) This appeal is predicated upon the trial court's refusal to enter judgment N.O.V. for appellant because the doctrine of last clear chance was inapplicable to this case.

Special interrogatories were submitted to the jury. The interrogatories and the jury's answers thereto were:

> Has the plaintiff proved by a fair preponderance of the evidence that defendant was negligent, and that such negligence was the proximate cause of the accident?
> Answer: Yes.
>
> Has the defendant proved by a fair preponderance of the evidence that plaintiff was negligent and that her negligence proximately concurred in any degree with defendants negligence in causing the impact and her resulting injuries and damages?
> Answer: Yes.
>
> Has the plaintiff proved by a fair preponderance of the evidence that the defendant had the last clear chance to avoid the accident under the instructions of the court?
> Answer: Yes.

STATEMENT OF POINTS

The court erred in failing to enter judgment N.O.V. for appellant because the doctrine of last clear chance was inapplicable to this suit for damages for personal injury and property damage.

TRAFFIC REGULATION INVOLVED

Traffic and Motor Vehicle Regulations of the District of Columbia § 48:

> ". . . Every driver of a vehicle approaching an intersection at which an official 'stop' sign has been erected shall come to a complete stop and after having stopped shall yield the right-of-way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said

highway as to constitute an immediate hazard during the time that such vehicle is moving across or within the intersection".

SUMMARY OF ARGUMENT

The doctrine of last clear chance was inapplicable to the facts of this case. The doctrine is only applicable when a defendant, after a perilous situation has arisen by virtue of the negligence of both plaintiff and defendant, has a chance to avoid the accident *after* the peril develops. No such chance existed for appellant. The peril here arose when appellee negligently ignored the stop sign requirements. Appellant as quickly as was humanly possible slammed on his brakes. Appellee did nothing. The accident happened. Despite appellant's determined effort to avoid the collision, appellee, who had done nothing to avoid it, contended appellant could have done more. But there was no evidence that he had a chance to do more. He therefore did not have the last clear chance and the doctrine should not have been invoked.

ARGUMENT

Obviously, this accident occurred because both of the automobiles involved approached and entered the intersection at approximately the same time. It is also obvious that appellee violated § 48 of the applicable traffic regulations and breached her duty to look and look effectively so as to see and appreciate what was plainly there to be seen. *Landfair* v. *Capital Transit Co.*, 83 U.S. App. D.C. 60, 165 F.2d 255 (1948). This is the testimony; the collision itself compels this conclusion; and, the jury has so found. The testimony was that appellee did not stop for the stop sign. There was no testimony that she did. However, even if it were to be assumed *arguendo* that she did, she nevertheless failed to yield the right of way to appellant's vehicle, as she was required to do under the regula-

tion, because it was approaching so closely as to constitute an immediate hazard to her were she to undertake to cross in front of it. As the impartial witness Parkes graphically stated: She must not have seen appellant because ". . . a sane person wouldn't pull out in front of an oncoming car so that the car would hit her". Clearly, appellee's negligent conduct was the proximate cause of this accident.

It was appellee's theory, however, that appellant was also negligent [3] *and* that she was entitled to the benefit of the doctrine of last clear chance. Although appellee did nothing to avoid the accident, she contended that appellant should have done something more than slam on his brakes in an effort to avoid the collision. She did not specify at pretrial [4] and offered no evidence at trial as to what appellant could and should have done that he did not do. Nevertheless, it was appellee's argument to the jury that after the peril arose appellant in addition to slamming on his brakes could and should have swerved his automobile or sounded the horn. This was sheer speculation.

The doctrine of last clear chance is only available to a negligent plaintiff when a negligent defendant has a reasonable opportunity, *after the peril has arisen*, to do something that a reasonable man could have done to avoid the accident that he did not do. *Dean* v. *Century Motors*, 81 U.S. App. D.C. 9, 154 F.2d 201 (1946); *Landfair* v. *Capital Transit Co.*, 83 U.S. App. D.C. 60, 165 F.2d 255

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[3] Her witness was of the opinion that appellant's skid marks indicated appellant was traveling at a minimum speed of 35 miles per hour when he observed and immediately reacted to the peril brought about by appellee's negligent conduct. Had appellant been traveling at a lesser speed, this witness opined, his automobile would have stopped 3 feet short of impact.

[4] See *Johnson* v. *Geffen*, 111 U.S. App. D.C. 1, 294 F.2d 197 (1960), wherein this court stated that the notation of the doctrine of last clear chance in a pretrial order ". . . is a reservation of a point of law and not an allegation of negligence". Nowhere in the pretrial order is there an allegation that after the peril arose appellant could and should have swerved or sounded his horn.

(1948); *United States* v. *Morrow*, 87 U.S. App. D.C. 84, 182 F.2d 986 (1950); *Gay* v. *Augur*, 97 U.S. App. D.C. 336, 231 F.2d 495 (1956); *Richardson* v. *Gregory*, 108 U.S. App. D.C. 263, 281 F.2d 626 (1960); *Conlon* v. *Tennant*, 110 U.S. App. D.C. 140, 289 F.2d 881 (1961). ". . . the last clear chance is a chance that arises after the peril has developed. . ." *Gay* v. *Augur*, *supra*. "It rests upon the assumption that he is the more culpable whose opportunity to avoid the injury was later." *Kansas City Southern Ry.* v. *Ellzey*, 275 U.S. 236, 241 (1927). Appellant had no such chance or opportunity. Here the peril arose when appellee either ignored the stop sign or negligently shot into the intersection from a stopped position into the path of appelant's automobile. No peril existed prior to this because appellant was entitled to assume, until the contrary should appear to a reasonable man, that appellee would conduct herself in a non-negligent fashion and obey the stop sign requirements. There was no testimony nor evidence that appellant did not see and appreciate the peril when he should have. Rather it was appellee's theory that appellant could and should have done something more than slam on his brakes. Yet there was no evidence from which it could be inferred that appellant had an opportunity to do anything after he applied the brakes in his determined effort to avoid the accident.

According to the evidence most favorable to appellee, appellant was 72½ feet from the point of impact traveling at 35 miles per hour when the peril arose. The testimony was that an average person requires ¾ of a second in which to react to the danger. During this period appellant traveled over half the distance to the point of impact. Appellant's determined effort to avoid the accident by slamming on the brakes took place in that period of time and in that distance. His vehicle then slid the remaining 35 feet on the wet pavement into appellee's automobile. There was no testimony and no evidence that there was sufficient time for a reasonable man to have

again reacted so as to do something more—if indeed a reasonable man could conclude that another reasonable man was required to have the presence of mind to sift alternatives and make qualitative judgments under these circumstances.[5]

Appellee argued below and presumably will so argue here that the case of *Capital Transit Co.* v. *Garcia*, 90 U.S. App. D.C. 168, 194 F.2d 162 (1952), supports her theory. In that case passengers on a street car observed a pedestrian walking through the street towards the street car track oblivious of the street car's approach. The court held that the street car operator who did nothing to avoid the accident should have sounded his gong so as to prevent the pedestrian from walking into the side of the street car. Appellee contends here that appellant should have sounded his horn in addition to slamming on his brakes. What she overlooks, however, is that in *Garcia* the street car operator had an opportunity—he physically and mentally had the time—to sound his gong. Here there was no evidence that such an opportunity existed for appellant. The evidence was that appellant was 72½ feet from impact when the peril arose. It took him as an average human being ¾ of a second to react. During this time he traveled 37½ feet. The brakes then came into play and he skidded the remaining 35 feet on the wet pavement into appellee's vehicle. Did it take appellant more time, less time or the same time to skid this lesser distance on the wet pavement? It would be sheer conjecture to say. But no jury could reasonably conclude that appellant had a sufficient opportunity to react again. As this court stated in *Dean* v. *Century Motors*, 81 U.S. App. D.C. 9, 10, 154 F.2d 201, 222 (1946):

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[5] See *United States* v. *Morrow*, 87 U.S. App. D.C. 84, 87, 182 F.2d 986, 989, (1950), wherein this court stated: "We have found no case which extends [the doctrine of last clear chance] to a situation where, as here, the antecedent negligence was supplanted by a determined effort to avoid the accident when plaintiff's negligence occurred and her perilous situation arose."

> [The doctrine of last clear chance] is not applicable if the emergency is so sudden that there is no time to avoid the collision, for the defendant is not required to act instantaneously.[6]

Clearly, appellant did not have a last clear chance to avoid this accident. The peril arose, appellant reacted immediately and applied his brakes, appellee did nothing, the accident happened.

CONCLUSION

Our system of justice contemplates and requires that if both plaintiff and defendant have negligently contributed to an accident and the defendant did not truly have a chance to avoid it after the peril created by the negligence of both arose, that the defendant is not to be subjected to liability for damages. This is such a case. Since the evidence conclusively established, and the jury so found, that appellee's negligent conduct contributed to this accident and since appellant did not have the last clear chance to avoid the collision, the doctrine of last clear chance was inapplicable. Accordingly, the case should be reversed for failure to grant appellant's motion for judgment N.O.V.

Respectfully submitted,

FRANK F. ROBERSON
JEREMIAH C. COLLINS
800 Colorado Building
Washington, D. C.

Attorneys for Appellants

Of Counsel:

HOGAN & HARTSON

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[6] The *Dean* case also involved an intersectional collision and this court held the doctrine of last clear chance to be inapplicable to the circumstances in that case stating that one second was ". . . obviously not enough time to avert the accident." Ibid.

INDEX TO JOINT APPENDIX

APPENDIX

CIVIL DOCKET

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Date	Proceedings	Fees	Total
1960	Deposit for cost by		
Oct. 4.	Complaint appearance Jury Demand filed		
Oct. 18	Answer of defts. to complt; c/m 10-18-60; app. Hogan & Hartson, filed		
1961			
Nov 8	Pretrial Proceedings Pretrial Examiner		
1962			
	* * * *		
1963			
Mar 25	Jury and two alternates sworn; juror #8 excused, replaced by juror #1 (alt.); juror #6 excused, replaced by juror #2 (alt.); respited to 3-26-63 at 10:00 a.m. (Rep. E.A. Kaufman) Youngdahl, J.		
Mar. 26	Trial resumed; same jury; respited to 3/27/63 at 10:00 a.m. (Rep. C. Russell Walker) Youngdahl, J.		
Mar. 27	Stipulation of counsel withdrawing pltff. #1 Claim from determination by the jury and that judgment be entered in accordance ance with the verdict. filed		

Date 1963	Proceedings	Fees	Total
Mar. 27	Trial resumed; same jury jury begins deliberation; jury excused to 3-28-63 at 9:30 a.m. to continue deliberations. (Rep. E. A. Kaufman) Youngdahl, J.		
Mar. 28	Jury resumes deliberations; jury turns sealed verdict to be opened 3-29-63 at 9:30 a.m. (Rep. E.A. Kaufamn) Youngdahl, J.		
Mar. 29	Sealed verdict opened; verdict for pltff. #2 vs. Defts. for $7,500.00 (Rept. E. A. Kaufman). Youngdahl, J.		
Mar. 29	Verdict and judgment for pltff. #2 vs. defts for $7,500.00 and costs. (N) Youngdahl, J.		
Mar. 29	Interrogatories to jury. filed		
Apr. 4	Motion of defts for judgments N.O.V.; c/m 4-4-63; P & A; M.C. 4-4-63. filed		
May 7	Judgment for pltff Cooper Benedict vs. defts Albert C. Frost & Hugh C. Frost, for $580.00, with interest and costs. (N) Youngdahl, J.		
May 7	Order denying motion of defts for judgment N.O.V. (N) Youngdahl, J.		
June 3	Notice of appeal of defts; deposit by Wilson, $5.00 (copy mailed to Ralph H. Deckelbaum) filed		

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3271-60

COOPER P. BENEDICT, BETSY ANN SIEGELTUCH
2400 Foxhall Road, N. W., Washington, D. C.
Plaintiffs,

v.

ALBERT C. FROST, HUGH C. FROST
3801 Jocelyn Street, N.W., Washington, D. C.
Defendant.

COMPLAINT FOR NEGLIGENCE
(PERSONAL INJURIES AND PROPERTY DAMAGE)

1. Plaintiffs bring this action for damages sustained in an auto accident and the amount involved exceeds $3,000.00 exclusive of interest and costs.

2. On Wednesday, June 29, 1960, plaintiff Betsy Ann Siegeltuch was operating an auto owned by plaintiff Cooper P. Benedict on Yuma Street, N.W., in the District of Columbia. Defendant Hugh C. Frost was operating an auto on Thirty-sixth Street, N.W., in the District of Columbia. Said auto was owned by defendant, Albert C. Frost, father of Hugh C. Frost, and was being operated by Hugh C. Frost for the benefit of Albert C. Frost or with his consent, approval or permission.

3. At the intersection of Yuma Street and Thirty-sixth Street, N.W., the auto operated by Hugh C. Frost collided with and struck the auto operated by Betsy Ann Siegeltuch. Said collision was caused by the negligence and carelessness of Hugh C. Frost who drove at excessive speed, failed to slow for the intersection, failed to yield the right of way, failed to give full time and attention to his driving and failed to keep the auto he was operating under control. Hugh C. Frost was licensed to drive an

auto only when wearing glasses. He was not wearing glasses and was an unlicensed driver.

4. Albert C. Frost was negligent and careless in allowing Hugh C. Frost to operate the auto of Albert C. Frost.

5. In consequence of the negligent, improper and unlawful conduct of defendants, the plaintiffs suffered injuries and damages as follows:

a. The auto of Cooper P. Benedict was damaged beyond repair, and he was deprived of the use thereof. WHEREFORE, he demands judgment of defendants and of each of them in the sum of $1,000.00 and costs.

b. Betsy Ann Siegeltuch sustained serious and permanent injuries to her head, neck and other portions of her body. She has suffered damage to her heart and there has been serious damage to her sense of smell. Said injuries have caused her great pain and mental anguish, and a severe shock to her nervous system. She has been confined to hospitals and has received and will receive medical attention, treatment and nursing, all at great expense, including expense for x-rays. She has been and will be deprived of gainful employment and of the enjoyment of life. WHEREFORE, she moves for judgment of defendants and of each of them in the sum of $100,000.00 and costs.

/s/ H. J. Cohen
HYMAN J. COHEN
Attorney for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs claim trial by jury of all issues in this case.

/s/ H. J. Cohen

* * * *

ANSWER OF DEFENDANTS

First Defense

The claim of the plaintiff, Cooper P. Benedict, is not within the jurisdiction of this Court.

Second Defense

The defendants admit that on June 29, 1960, there was a collision within the intersection of Yuma Street and 36th Street, N.W., Washington, D.C., between an automobile owned by the defendant, Albert C. Frost, being operated by the defendant, Hugh C. Frost, and an automobile being operated by the plaintiff, Betsy Ann Siegeltuch. Defendants deny that the accident was caused by negligent operation of the Frost automobile and they have no knowledge nor information sufficient to form a belief as to the allegations of injuries and damages contained in the complaint.

Third Defense

The accident was caused or contributed to by negligence and violation of traffic regulations upon the part of the plaintiff, Betsy Ann Siegeltuch.

HOGAN & HARTSON

By FRANK F. ROBERSON
800 Colorado Building,
Washington, D.C.

NEWMYER & BRESS

By .....
1001 15th Street, N. W.,
Washington, D.C.
Attorneys for Defendants

CERTIFICATE OF SERVICE

A copy of the foregoing Answer was mailed, postage prepaid, this 18th day of October, 1960, to Hyman J. Cohen, Esquire, attorney for plaintiffs, 1331 G Street, N.W., Washington 5, D.C.

HOGAN & HARTSON

By FRANK F. ROBERSON
Attorneys for Defendants

* * * *

Filed Nov. 8, 1961, Harry M. Hull, Clerk

PRETRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE:

Action for personal injuries, property damage, negligence.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS:

On June 29, 1960, at about 6:30 PM streets were wet, no defects, daylight. The female P, Betsy Ann Siegeltuch was operating an automobile owned by the male Plaintiff, Benedict in a westerly direction on Yuma St., N.W., Wash., D.C. At the intersection of 36th St. and said street, a vehicle operated by Hugh C. Frost operated with the permission of the owner, Albert C. Frost, was in collision with P's vehicle. The Frost vehicle had been traveling south. Traffic on Yuma St. was controlled by a "Stop" sign.

PLAINTIFFS CLAIM that the accident, their injuries & damages were caused by the negligence of and violations of DC Traffic Regulations as follows: Albert Frost was negligent in allowing his son, Hugh C. Frost, when he knew, or should have known, that Hugh Frost was an incompetent driver, to operate his, Albert's, automobile; that the vehicle was being driven at an excessive rate of speed; failed to slow down for an intersection; failed to yield the right of way; operater failed to give full time & attention; failed to keep the automobile under control, and altho he was licensed to drive only when wearing eye glasses, he was not wearing said glasses at the time of the accident, thereby becoming an unlicensed driver.

Ps rely on the doctrine of last clear chance.

Secs. 21(a), 22(a), 22(b)1, 22(c), 46(a), 48, 99(c), 157(k).

DEFENDANTS deny any negligence or violations of traffic regulations, particularly deny the applicability of Sec. 46(a) of the DC Traffic Regulations, to this accident; assert that the accident occurred by reason of the sole or contr neg or the violation of DC Traffic Regs as follows: failed to stop at a "Stop" sign; failed to yield the right of way; failed to keep a proper lookout; proceeded at an unreasonable rate of speed; failed to slow down for an intersection; failed to look or look effectively to see what was there to be seen; failed to give full time & attention to the operation of the vehicle; failed to control her speed so as to avoid colliding. Traffic Regs., Secs. 22(a)&(c), 46(a) & (b), 48, 99(c).

D denies the applicability of the doctrine of last clear chance, and denies that the fact that the D may have been operating without glasses either makes him an unlicensed driver, constitutes evidence of negligence, or was the proximate cause of the accident. Further assert that Benedict's claim is not within the jurisdiction of this court because of the amount claimed.

INJURIES

Cerebral concussion and impairment of sense of smell; laceration of scalp; acute flexion extension injury of cervical spine; multiple contusions and abrasions; scar on right leg; change in cardiac rhythm.

P. claims permanent injuries insofar as the scar on leg and the loss of smell and neck injury are concerned.

SPECIAL DAMAGES

Georgetown University Hospital, $552.95; A.J. Luessenhop, M.D., $150.00; J.K. Perloff, M.D., $50.00; M.M.

Kenrick, M.D., $15.00; Practical Nurse, approx. $200.00; Loss of earnings, Edward P. Morgan, commentator, one month, $350.00—$400.00; alteration of clothes due to loss of weight, $40.00—$50.00; heating pad, transportation expense, approx. $50.00.

Property damage—1957 Anglia Sedan, total loss, $580.00.

STIPULATIONS

The following may be admitted in evidence without formal proof subject to objections as to materiality & relevancy: hospital records; hospital and x-ray bills, initialled by Examiner; x-ray plates; HEW Mortality Tables; DC Traffic Regulations; photographs, initialled by Examiner; plat or diagram, if initialled by counsel for both parties; any other photographs, if initialled by counsel for both parties.

The parties agree to the mutual exchange in writing on or before Dec. 4, 1961, of the name(s) and address(es) of witnesses to the accident, to the circumstances surrounding same, and with reference to the nature and extent of injuries and damage, filing a copy thereof on or before said date with the Clerk of the Court.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before Dec. 4, 1961, and a similar exchange of all such reports within 48 hours of the alert of this case for trial.

Counsel for P agrees to make the P available for the purpose of a physical examination by physician of D's choice before, but not to interfere with, trial.

The Examiner has requested counsel for D to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

Counsel for the P agrees to furnish counsel for D a written authorization, which will be provided by the D, which fill enable the D to examine and copy hospital records concerning the plaintiff, with the further proviso that anything copies will be made available to counsel for Plaintiff.

TRIAL COUNSEL: Hyman J. Cohen, Esq. for Plaintiff, Francis L. Casey, Jr., Esq. for Defendant.

NOTE: Although counsel for the Plaintiff claims permanent injury as noted herein, at pretrial, counsel had no written medical evidence to support these contentions.

H. J. COHEN
Counsel for Plaintiff

DAVID N. WEBSTER
Counsel for Defendant

JOHN L. FINN
Pretrial Examiner

* * * *

Filed Mar. 29, 1963, Harry M. Hull

INTERROGATORIES

1. Has the plaintiff proved by a fair preponderance of the evidence that defendant was negligent, and that such negligence was the proximate cause of the accident?

Yes ✓ No —

2. Has the defendant proved by a fair preponderance of the evidence that plaintiff was negligent and that her negligence proximately concurred in any degree with defendant's negligence in causing the impact and her resulting injuries and damages?

Yes ✓ No —

3. Has the plaintiff proved by a fair preponderance of the evidence that the defendant had the "last clear chance" to avoid the accident under the instructions of the Court?

Yes ✓ No —

/s/ Thomas J. Taylor
Foreman or Forewoman

March 28, 1963
Date

* * * *

Filed Mar. 29, 1963, Harry M. Hull

VERDICT AND JUDGMENT

This cause having come on for hearing on the 25th day of March, 1963, before the Court and a jury of good and lawful persons of this district, to wit:

Alvin L. Jackson	Bernard W. Gordon
Miss Helen F. Self	Mrs. Virginia M. Rosser
Thomas J. Taylor	Mrs. Lucille F. Edminster
Miss Minnie M. Tucker	Anthony J. Mielke, Jr.
Frank R. Kent, Jr.	Miss Mary E. Phettaplace
Walter T. McGhee	Mrs. Evelyn T. Perrin

who, after having been duly sworn to well and truly try the issues between Betsy Ann Siegeltuch, plaintiff and Albert C. Frost and Hugh C. Frost, defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 29th day of March, 1963, that they find the issues aforesaid in favor of the plaintiff and that the money payable to her by the defendants by reason of the premises in the sum of Seven Thousand Five Hundred Dollars ($7,500.00)

WHEREFORE, it is adjudged that said plaintiff recover of the said defendants the sum of Seven Thousand Five Hundred Dollars ($7,500.00) together with costs.

HARRY M. HULL, *Clerk,*

By /s/ William A. Heede
Deputy Clerk.

By direction of
Judge Luther W. Youngdahl

(N)

* * * *

MOTION OF DEFENDANTS FOR JUDGEMENTS N.O.V.

Come now the defendants, pursuant to Rule 50(b), Federal Rules of Civil Procedure, and move the Court to set aside the verdict and judgment herein and to enter judgments notwithstanding the verdict in favor of the defendants, and, as reason therefor, state that defendants are entitled to judgments in their favor as a matter of law by virtue of the fact that the doctrine of last clear chance was inapplicable to the circumstances of this case.

HOGAN & HARTSON

By .....
JEREMIAH C. COLLINS
Attorneys for Defendant

CERTIFICATE OF SERVICE

A copy of the foregoing motion and attached memorandum of points and authorities in support of motion was mailed, postage prepaid, this 4th day of April, 1963, to Ralph H. Deckelbaum, Esquire, attorney for plaintiff, 1000 Vermont Avenue, N.W., Washington, D.C.

HOGAN & HARTSON

By .....
JEREMIAH C. COLLINS
Attorneys for Defendant
800 Colorado Building
Washington, D.C.

* * * *

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANTS FOR JUDGMENTS N.O.V.

Statement of Case

This is an action for damages for personal injuries sustained by plaintiff in an automobile accident occurring on June 29, 1960 at the intersection of Yuma and 36th Streets, N.W. in this city. The jury has returned a verdict in favor of plaintiff in the amount of Seven thousand five hundred ($7,500) dollars. Special interrogatories submitted to the jury reveal that the jury concluded that defendant Hugh Frost, Jr., was negligent and that his negligence was a proximate cause of the accident; that plaintiff was negligent and that her negligence was a proximate cause of the accident; and, that the defendant had the last clear chance.

The accident occurred at about 6:30 p.m. The streets were wet. Plaintiff was travelling west on Yuma Street. Travel on Yuma Street at the intersection in question is governed by a stop sign. The defendant Hugh Frost Jr., was operating his father's automobile south on 36th Street. Yuma Street is 30 feet wide and 36th Street is 26 feet wide. The collision between these two automobiles occurred in the intersection at a point 7 feet south of the north curb of Yuma Street and 11 feet west of the east curb of 36th Street. Plaintiff does not recall how the accident occurred. All of the eye witnesses to the accident stated that the vehicles approached the intersection at approximately the same time. Defendant Hugh Frost, Jr. testified that he first noticed danger when he was approximately fifty feet from the intersection travelling at a speed of approximately 25 miles per hour and that he slammed on his brakes. Plaintiff's alleged expert testified that in his opinion defendant was travelling 34 miles per

hour and that defendant observed danger 78 feet from the intersection. But both agree that at the moment danger was thought to be seen, whether 50 or 78 feet from the intersection, that defendant reacted as immediately as possible and slammed on the brakes. This reaction, we were informed, took from ½ second to a second. Defendant slid 35 feet on the wet pavement to the point of impact.

Argument

The doctrine of last clear chance was inapplicable to the facts of this case and should not have been invoked. That doctrine is only applicable when defendant has a reasonable opportunity to do something that a reasonable man could have done after a perilous situation has arisen by virtue of the negligence of the plaintiff and the defendant. Here defendant had no such opportunity. The fact of the collision, the evidence and the jury's answers to the special interrogatories demonstate that the vehicles approached and entered the intersection at approximately the same time. Defendant Hugh Frost, Jr. testified that he was fifty feet from the intersection when he realized plaintiff was not going to stop for the stop sign. Plaintiff's alleged expert opined that defendant was 78 feet from the intersection when he realized that plaintiff was not going to stop for the stop sign. Regardless of which figure is correct, both the defendant and the expert agree that the defendant applied his brakes as quickly as was humanly possible. Unfortunately, after he had so reacted, his automobile slid on the wet pavement into plaintiff's car. Thus, although he tried, he obviously did not have a last clear chance to avoid the accident.

As was said by the Court in *Dean* v. *Century Motors*, 81 U.S. App. D.C. 9, 154 F.2d 201 (1946), wherein the Court held that the doctrine was inapplicable to the facts of that case which involved a vehicular collision in an uncontrolled intersection:

> In these circumstances, we see no proper place for an instruction on last clear chance. The doctrine presupposes a perilous situation created or existing through the negligence of both the plaintiff and the defendant, but assumes that there was a time after such negligence had occurred when the defendant could, and the plaintiff could not, by the use of means available, avoid the accident. It is not applicable if the emergency is so sudden that there is no time to avoid the collision, for the defendant is not required to act instanteously.

There is not one bid of evidence in this case that there was a time *after the peril* arose that defendant could have avoided the accident. Indeed, the evidence is to the contrary. Defendant saw and immediately slammed on his brakes. The accident then happened.

Despite this, however, plaintiff claims that after both she and the defendant had been negligent and created the danger that defendant could have done something that a reasonably prudent person under the same or similar circumstances could and would have done. Yet she did not specify at pretrial what defendant could and should have done after the peril arose that he did not do and she offered no evidence at trial of what defendant could and should have done after the peril arose that he did not do. And she invites this Court to overlook or choose to ignore that the accident occurred within a second or two of the creation of the perilous situation during which time, in a determined effort to avoid the accident, defendant reacted, applied his brakes and slid on the wet pavement into the collision. The jury, by virtue of its answer to interrogatory number one, concluded that defendant negligently did or failed to do something that concurred with plaintiff's negligence and gave rise thereby to a perilous situation. The plaintiff then did nothing but the defendant made an immediate determined effort to avoid the accident. Since this is so the doctrine of last clear chance was inapplicable. As was said in *United States* v. *Mor-*

row, 87 U.S. App. D.C. 84, 182 F.2d 986 (1950), in holding that last clear chance was inapplicable to that case, and reversing the trial court for so invoking it:

> We have found no case which extends this rule to cover a situation where, as here, the antecedent negligence was supplanted by a *determined effort to avoid the accident when plaintiff's negligence occurred and her perilous situation arose.* The [defendant's] negligence, the court found, consisted of having failed, previously to that event, to heed a "Slow" sign and also in not slowing down for the intersection. He was going too fast; but there is no finding he failed to exert every effort to avoid the accident when plaintiff turned into his path. There was no continuing negligence though there was the effect of prior negligence. In any event, the doctrine of the cases last cited has not been applied in Virginia so as to cover this situation. We do not feel justified in going beyond the rule for Virginia which has been laid down by her own courts, especially when *to approve the theory by the trial court would also go beyond the rule which has been followed in cases governed by the law of this jurisdiction. See Dean* v. *Century Motors, Inc., 1946, 81 U.S. App. D.C. 9, 154 F.2d 201.* [Emphasis supplied]

Similarly here, the negligence of defendant Hugh Frost, Jr. was supplanted by his immediate determined effort to avoid the accident when plaintiff's negligence occurred and the perilous situation arose.

The circumstances of this case clearly show that there was not a time after defendant and plaintiff had negligently created the peril that defendant could and plaintiff could not avoid the accident. It is clear that defendant did not have a last clear chance to avoid the accident. It is also clear that he nevertheless made a determined effort to do so. Since the jury has found both plaintiff and defendant guilty of negligence which concurred in proximately causing the accident and

since there is no basis for the invocation of the doctrine of last clear chance, defendants are entitled to judgments in their favor notwithstanding the verdict.

Respectfully submitted,

By .....
JEREMIAH C. COLLINS

Filed May 7, 1963, Harry M. Hull, Clerk

* * * *

ORDER

This matter came on to be heard before this Court on the 2nd day of May, 1963, on a motion of defendants for judgment n.o.v. Upon the oral arguments and briefs submitted and upon all the files and proceedings herein, it is by the Court this 7th day of May, 1963,

ORDERED That said motion be and the same is hereby in all things denied.

/s/ Luther W. Youngdahl
Judge

Filed Mar. 27, 1963, Harry M. Hull

* * * *

STIPULATION

It is stipulated to by and between the plaintiff Cooper Benedict and the defendants Albert C. Frost and Hugh C. Frost, by their respective attorneys as follows:

1. That the claim of the plaintiff Cooper Benedict is withdrawn from determination by the court and jury.

2. That in the event the plaintiff Betsy Ann Siegeltuch recovers a judgment against the defendants, a judgment be entered in favor of the plaintiff Cooper Benedict in the sum of Five Hundred Eighty ($580.00) Dollars.

3. That in the event judgment is rendered in favor of the defendants Frost, that a judgment be entered against plaintiff Cooper Benedict and in favor of the defendants Frost.

Dated this 27th day of March, 1963.

/s/ Ralph H. Deckelbaum
RALPH H. DECKELBAUM
Attorney for Plaintiff Cooper P. Benedict

HOGAN & HARTSON

By /s/ Jeremiah C. Collins
JEREMIAH C. COLLINS
Attorney for Defendants

* * * *

ORDER

This matter having come before the Court after a jury having rendered a verdict in favor of the plaintiff, Betsy Ann Siegeltuch, against the defendants and judgment having been entered thereon, and it appearing to the Court that the claim of Cooper Benedict having been reserved by a stipulation filed in this action should now be resolved, it is, by the Court, this 7th day of April, 1963.

ORDERED, ADJUDGED, and DECREED that the plaintiff Cooper Benedict recover of the defendants, Albert C. Frost and Hugh C. Frost, the sum of Five Hundred Eighty ($580.00) Dollars, together with interest and costs.

/s/ Luther W. Youngdahl
Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was mailed, postage prepaid, this 10th day of April, 1963 to Jeremiah C. Collins, Esq., Hogan & Hartson, Attorney for Defendants, Colorado Building, Washington, D.C.

RALPH H. DECKELBAUM
Attorney for Plaintiffs
1000 Vermont Avenue, N.W.
Washington, D.C.

* * * *

NOTICE OF APPEAL

Notice is hereby given this 3rd day of June, 1963, that defendants, Albert C. Frost and Hugh C. Frost, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the judgments of this Court entered on the 7th day of May, 1963, and on the 29th day of March, 1963, respectively, in favor of plaintiffs against said defendants and from the denial on May 7, 1963 of said defendants' motion for judgment N.O.V.

HOGAN & HARTSON

By /s/ Jeremiah C. Collins
JEREMIAH C. COLLINS
Attorneys for Defendants
800 Colorado Building
Washington, D.C.

Please Serve:

Ralph H. Deckelbaum
1000 Vermont Avenue, N.W.
Washington, D.C.
Attorney for Plaintiffs.

PROCEEDINGS

* * * *

THOMAS SCOTT MANGUM

* * * *

DIRECT EXAMINATION

BY MR. DECKELBAUM:

* * * *

Q Where are you assigned? A With the Accident Investigation Unit.

Q How long have you been so assigned? A About thirteen years.

Q Officer, during the course of your duties on June 29, 1960, did you have occasion to investigate an accident at 36th and Yuma Street, Northwest? A I did.

* * * *

Q All right. Would you tell us what you found when you arrived on the scene? A The two cars involved were still on the roadway, that is the defendant's car, a '51 Mercury two-door sedan, D. C. license AZ 228 was in the middle of the roadway, and that operated by Miss Betsy Siegeltuch, a '57 English Ford, two-door, with West Virginia license 85331 was over up on the sidewalk or corner of the sidewalk on the southwest corner.

The rear of this vehicle was resting against a stop sign.

Q All right. Now, did you have a conversation with the operator of the Mercury? A I did.

Q Did you ascertain which way he was traveling? A He was traveling south on 36th Street.

Q All right. Did you ascertain from him which way the English Ford was traveling? A West on Yuma Street.

Q During the course of your investigation, did
13 you make certain measurements? A I did.
Q All right. Did you measure the width of Yuma Street? A Yes. That is 30 feet wide.

* * * *

Q What was the width of 36th Street? A The useable portion of 36th Steet, north of Yuma Street, since it did not have a curb, was 26 feet.
Q What do you mean by "useable portion"? A Well, we measured the extent of the pavement, the macadam surface.

* * * *

14 Q All right. Did you establish a point of impact on the vehicles? A I did.
Q How did you establish it? A From the skid marks and the brush marks.
Q All right. Where did you establish the point of impact? A The left side of the Mercury going south on 36th Street was 11 feet west of the east curb of 36th, and Miss Siegeltuch's English Ford, the right side of which was 7 feet south of the north curb of Yuma Street.

* * * *

Q All right. Now, you mentioned some skid marks. Did you determine which vehicle laid these skid marks down? A Yes, the vehicle south on 36th Street operated by Mr. Frost.
Q Would you describe these skid marks? A They were well defined skids and we measured the skid
15 up to the point of impact as 35 feet, and the continuing skid to the point where the car came to rest, the right front skid was 24 feet, the left front skid was 27 feet. The car had spun slightly in the street when it came to rest.
Q Were there any skid marks from Miss Siegeltuch's vehicle? A No, there was not. We measured distance

from the point of impact to where her car came to rest against the stop sign as a distance of 39 feet.

Q What was the condition of the weather at the time you arrived at the scene? A It was a light rain.

Q Is this intersection controlled by stop signs? A It is.

Q Could you tell us where the stop signs are located? A the stop sign is located on the northeast corner of 36th and Yuma controlling traffic on Yuma Street, and on the southwest corner controlling traffic on Yuma, that would be eastbound.

Q Now, with respect to the stop sign located at the northeast corner of the intersection, which controls westbound traffic, did you determine how close that stop sign was to the intersection? A I didn't measure the
16 distance but I think it would have been approximately 20 feet back from the intersection of 36th Street.

Q What was the condition of the lighting at this lighting at this time; was it daylight, dark? A I don't recall that. I'd have to look on my P.D. 10, probably that would show the lighting condition. We have it as daylight.

Q Do you recall the colors of the vehicles or do you have any indication on your reports as to the colors of the various vehicles? A Yes, we have a place on our rough notes that we take for that. Mr. Frost's car was a dark grey, and Miss Siegeltuch's was kind of an off-colored blue. I am somewhat confused sometimes whether it is blue or green, some of the colors are so near.

* * * *

18 Q Officer, did your investigation reveal any mechanical deficiency with respect to the Mercury or the Ford? A No.

Q Prior to the accident, that was? A No, I did not.

Q And are you able to state the physical and mental condition of the operators of the respective ve-
19 hicles? A Miss Siegeltuch was unconscious when I saw her and I was unable to talk to her. Mr. Frost certainly seemed to be normal when I spoke to him.

Q All right. Now, would you tell me what questions and what answers you got from Mr. Frost with respect to the accident? A The first question on our form here to investigate accidents, we have a prepared form of questions. He was asked when first seen, how far was the other vehicle from him, and he stated 100 feet. He didn't realize there was any danger until he was about 50 feet from this vehicle.

He was asked at this point, when you realized the danger, how fast were you traveling. He stated 25 miles per hour.

We asked how far he was from the point of impact when he first applied brakes, and he stated 40 feet.

I asked how fast were you still going when the collision took place, and he stated he didn't know.

I asked how far he thought his vehicle continued after the impact, and he stated 10 feet.

And he was probably asked this question: How fast was the other vehicle traveling when you first saw it, but I don't have any mark down here as to his answer.

Q Any other questions to Mr. Frost? A He
20 was asked if he would like to make any further statement and he said that the number two operator did not stop at the stop sign.

* * * *

Q Officer, did you take any photogrophs at the scene of the accident? A Yes, I did.

* * * *

21 (Plaintiffs' Exhibits 1 through 12, inclusive, were received in evidence.)

* * * *

Q Officer Mangum, I hand you the exhibits which have been marked Plaintiffs' Exhibits Nos. 1 through 12 and ask you if you could refer to each number and tell us what it depicts with relation to this accident? A Number one was taken of the right side of this English Ford driven by Miss Siegeltuch, showing the damage to the rear portion of the vehicle as well as the deflated tire that I testified to. In this picture you can't see the front tire, however. This door was apparently forced open by Miss Siegeltuch being thrown against it and out the door into the stone that I testified to earlier.

Now, number two is a picture of the windshield showing the shattered glass in the right portion of Miss Siegeltuch's car.

Number three shows, as I testified earlier, the rear bumper coming to rest against a stop sign. It doesn't show the stop sign itself, but the stanchion which supports the sign.

Number four shows the damage to the right front tire as it came to rest against the ground and curb on
22 the southwest corner, and also shows the right rear deflated tire and shows the damage to the front door, as well as the rear portion of this vehicle, and the shattered windshield.

Number five is the front portion of Miss Siegeltuch's car showing the damaged door and the right front damaged wheel.

Number six shows the right side of Miss Siegeltuch's car in this position resting against the curb with the right front wheel and the rear having pushed the stop sign backwards.

Number seven is primarily the same as number six.

This is another photograph of the rear of Miss Siegeltuch's car. In this picture you can see that the left rear wheel has gone completely up over the curb.

Number nine just shows the damage to the front portion of the right front door of Miss Siegeltuch's car which has a broken top hinge there.

Number ten was taken from the front of Miss Siegeltuch's car, showing its alignment with the south curb line of Yuma Street.

Number eleven, I believe, is a repetition of one earlier described, the damaged right side of Miss Siegeltuch's car, and the right front wheel.

Number twelve was taken of the interior of Miss Siegeltuch's car showing the shattered windshield.

* * * *

24 (Plaintiffs' Exhibits Nos. 13 and 14 were received in evidence.)

* * * *

Q Officer Mangum, I hand you what has been marked Plaintiffs' Exhibits 13 and 14 and ask you to tell the jury what they show.

* * * *

THE WITNESS: Number 13 was taken south of Yuma Street looking north on 36th Street. Apparently, the photographer was standing in the middle of the roadway of 36th Street, looking north on 36th, showing the stop sign as well as the corner, the northeast corner of this intersection.

Number 14 was taken on a slight rise on the west side of 36th Street and it's a slight downgrade from Reno Road down to 36th, but Yuma Street is straight, traveling east at this intersection. Apparently, the photographer was about 50 feet west of 36th Street
25 and took the picture looking east on Yuma, also showing this northeast corner.

BL MR. DECKELBAUM:

Q Officer, directing your attention to the fence that appears in both of these pictures, around the house lo-

cated at the northeast corner, can you tell me of your own recollection whether that fence was there at the time of this accident? A No, I don't remember whether the fence was there or not.

* * * *

Q Officer Mangum, at the time of this accident was Mr. Hugh Frost wearing glasses? A No, he was not.

Q Did you determine whether or not his permit required him to wear glasses while operating a motor vehicle? A It so stated.

Q It had a restriction on it? A That's correct.

* * * *

26 CROSS-EXAMINATION

BY. MR. COLLINS:

Q As a result of that his eyes were checked by the Traffic Division here, weren't they? A I believe they were, at the time of the hearing that was brought out, that he had that restriction lifted.

Q As a result of them being checked by the District of Columbia Government, they withdrew that restriction on his permit, didn't they? A I believe so, yes.

* * * *

29 Q Was the roadway wet? A Yes, it was.

* * * *

Q I understand it was still raining—not still, but— A Yes, light rain.

* * * *

REDIRECT EXAMINATION

BY MR. DECKELBAUM:

30 Q Even with this light rain you didn't have any trouble seeing these skid marks, did you? A No.

* * * *

32 ALFRED J. LUESSENHOP

* * * *

DIRECT EXAMINATION

BY MR. DECKELBAUM:

Q Doctor, would you state your full name, please? A Alfred John Luessenhop.

Q And your address? A Georgetown University Hospital.

Q And your profession? A Neurosurgeon.

* * * *

34 Q What is your connection with the neurosurgery department? A I am Chief of the Neurosurgical Department at Georgetown.

* * * *

35 Q Directing your attention to June 29, 1960, did you have occasion to see a Miss Betsy Siegeltuch? A Yes, I did.

Q Would you tell us where you saw her? A Emergency room at Georgetown University Hospital.

Q Were you able to obtain a history at that time? A Yes, I was.

Q Would you tell us what that history was? A She had been involved in an automobile accident, had been unconscious for 10 to 20 minutes, and was immediately thereafter brought to the emergency room.

Q Did you make a physical examination at that time? A Yes, I did.

Q Would you tell us what that examination revealed? A She was confused and amnesiaic from the accident, that is, does not recall anything about the acci-
36 dent, she was complaining bitterly of severe pain in her back and neck.

Her neck was stiff and she had a laceration or cut approximately here (indicating), almost down to the skull. She had also multiple bruises and minor scrapes and abrasions. Those were the major findings at that time.

Q All right. Did you make a diagnosis at that time? A Yes. She had a cerebral concussion and also she had acute flexion extension injury or, in other terms, whiplash injury. In addition there was a question of fracture of a cervical spine.

* * * *

Q All right. And you mentioned this amnesia. Is this a normal result of this type of injury? A Yes. If you are unconscious you are not aware of what is happening, so later on you don't recall that particular interval of time. This is a convenient way of checking whether or not a person was unconscious. This was conformitory and also corresponds, roughly, to the severity of the concussion, amnesiaic for preceding days, it indicates in a general way the concussion was a bit more severe.

* * * *

40 Q Did she develop any further problems? A Yes. When I saw her again she complained that she couldn't detect odors and properly—and that odors, some odors were perverted and very, very unpleasant.

And then when we checked her we found she had lost her sense of smell and that when she described further many things which before had been rather pleasant to smell, had become extremely unpleasant.

* * * *

48 WALTER ROY OSTROM

* * * *

DIRECT EXAMINATION

BY MR. DECKELBAUM:

* * * *

Q And what is your occupation? A I have been employed for the past five and a half years as a Traffic Accident Analyst and Consultant.

Q Prior to that what was your employment? A I was a supervisory sergeant on the Accident Investigation Unit of the Metropolitan Police Department.

Q When did you leave the Metropolitan Police Department? A 30 September 1957.

Q What was the reason for your leaving? A Retirement.

Q And since that date you have been engaged in
49 traffic accident analyst and consultant? A I have.

Q How long were you a member of the Metropolitan Police Department? A A little over 28 years, other than the time I was in the Military Service.

Q How long were you assigned to the Accident Investigation Unit? A I was first assigned to the Accident Investigation Unit on July 1, 1941, and was assigned there the majority of the time until I retired, other than Service time.

Q You retired in what rank? A I was Supervisory Sergeant.

Q What were your duties while assigned to the Accident Investigation Unit? A I supervised 56 patrolmen out on the street in accident investigation cars, 5 detectives who were engaged in the homicide work, and I had 4 motorcycles who worked on hit-run accidents.

I actually supervised them in their work. I also instructed the men in how to determine prior accident speed from skid marks, reaction distances, co-efficient of friction of various surfaces, and I responded in all seri-

ous and fatal accidents on the scene and took active part in the investigation.

50 I assisted detectives in the preparation of their cases for the Coroner's Jury, Grand Jury, petit jury, and generally supervised and instructed in this field in the Police Department.

Q Sergeant, where did you acquire your knowledge of breaking distance, reaction time, co-efficience of friction, and various other things you instructed the men on? A From July 1st, 1941, when I was first assigned to the Unit, I was very much interested in this phase of accident investigation work, nobody in the Police Department at that time, who was versed in this particular field. I studied everything I could get my hands on, including all materials from the Traffic Institute of Northwestern University, Bureau of Public Roads, Bureau of Standards, National Safety Council, International Association of Chiefs of Police.

Q How many tests would you say you conducted yourself over the past several years? A Breaking tests, you mean, sir?

Q Yes. A Oh, several hundred.

Q I understand that you were responsible for devising and instituting various braking distance and reaction for the Metropolitan Police Department and Traffic Court; is that correct? A Yes; during the 1940's I

51 went out to the Bureau of Standards and there, with one of their technical men, I went over the charts and the various formulas used to determine skids and prepared charts which were used at the Coroner's jury, Traffic Court, and also made individual cards for all the accident men to have with them so they could determine what prior accident speed was from the over-all skid mark.

Q Did you have instruction in this field? A Yes. I instructed before the rookie school of the Police Department, the Police Academy, and we also had from time to

time interdepartmental schools for the various scout car men in the District. I instructed in that.

I started the Traffic Violaters School and instructed in that for several years and I also lectured in this field before several law associations, commercial, military organizations, business companies.

Q Have you ever testified before as an expert witness on breaking distance, reaction time of drivers and coefficience of road surfaces? A Yes, many, many times. I testified in District Court of Baltimore, the Circuit Court at Annapolis, the Circuit Court in Rockville, the District Court in Harrisonville, Virginia, the Circuit Court of Arlington County and before this Court many times, and also before the General Sessions Court now, * * *

52 Q Mr. Ostrom, I am going to put to you a hypothetical question asking you to assume the existence of certain facts.

I want you to assume that about 6:30 p.m., on Wednesday, the 29th of June, 1960, during a slight drizzle of rain or immediately after a drizzle of rain, but at a time when the surface of the roadway was wet, a 1951 Mercury two-door sedan, in good mechanical condition, was being operated south on 36th Street.

Thirty-Sixth Street was a macadam surface in good condition, approximately level. This vehicle was being operated by a 21-year-old male driver, apparently normal mentally and physically.

At the same time a 1959 English Ford in good mechanical condition was being operated west on Yuma Street by a 21-year-old female, also apparently normal mentally and physically.

As the Mercury approached the intersection of Yuma Street the driver of the Mercury observed the English Ford at or near a stop sign at the northeast corner of the intersection. I am going to refer to the diagram over here, as I proceed.

This is the stop sign I just referred to and this would be 36th Street and this is Yuma Street. Immediate-
53 ly after observing this English Ford at the stop sign, the operator of the Mercury went into—applied his brake pedal and went into an emergency stop resulting in the Mercury laying down 35 feet of skid marks prior to the impact, which skid marks were well defined even though it was on a wet surface, and that the Mercury continued beyond the point of impact laying down 24 feet of skid marks on the right and 27 feet further on the left.

Assume that the point of impact was 7 feet south of the north curb of Yuma Street and 11 feet east of the west curb of 36th Street. Also, that the full front of the Mercury collided with the right side of the English Ford at the right door. The Mercury continued on and came to rest at a slight angle at the end of the skid marks.

The English Ford continued in a westerly direction after impact, also in a southerly direction or southwesterly general direction, turned completely around facing east, came to rest against a stop sign on the southwest corner of the intersection.

The stop sign at the northeast corner is approximately 20 feet east of the east curb of 36th Street, the one on the southwest corner about the same distance or perhaps less than that, perhaps 15 feet.

Considering this diagram and the information
54 that I have just related to you appears on here, not in scale, north is at the top of the diagram, would you also examine the photographs, Plaintiffs' Exhibits 1 through 14, Plaintiffs' Exhibits 1 through 12 depicting the English Ford in various positions, after impact, and Plaintiffs' Exhibits 13 and 14 showing the street scene, Plaintiffs' Exhibit 13 being a view looking from the south of Yuma Street north up 36th Street, and No. 14 being a view looking from west of 36th Street east down Yuma Street.

Now, Mr. Ostrom, assuming these facts to be true, do you, with reasonable certainty, based upon your knowledge and experience, have an opinion as to the following questions:

One, the speed that the Mercury was traveling when the driver braked in emergency conditions resulting in 59 feet of over-all skid marks on the right and 62 feet on the left side, that is, the 35 plus the 24 and 35 plus 27; do you have an opinion as to his speed? A Yes.

Q Would you tell us what that speed is?

MR. COLLINS: Just a minute. I object, Your Honor. I object for a number of reasons. Number one, I don't think this man is qualified to give an opinion. Number two, there are certain things that he has not been told or he has been told erroneously. He was asked to assume this stop sign was 20 feet. We know that was not
55 measured and the picture tends to belie that. There has been no testimony in this case that this man ever tested or examined the defendant. There has been no testimony from this man that he ever tested or examined the car that he was driving. There has been no testimony from this man or in this case as to whether this car was ever tested on a dry surface, a wet surface or macadam surface. There has been no testimony as to the amount of rain there was. We don't know how wet or how dry the pavement was.

I respectfully submit he should not be entitled to answer this question.

THE COURT: One point in the hypothetical question which you have assumed, that the Mercury driver observed the plaintiff at the stop sign at the northeast corner, where is there any testimony about that?

MR. DECKELBAUM: I believe my hypothetical question was in the area of the stop sign.

THE COURT: No, you assumed directly that the Mercury driver observed the plaintiff at the northeast corner at the stop sign. I mean, where is there any testimony about that?

MR. DECKELBAUM: If I am in error, Your Honor, the hypothetical question should have stated as follows: As the Mercury approached the intersection of Yuma Street the driver observed the English Ford at or
56 near the stop sign.

THE COURT: Where is there testimony from anyone that he observed the driver at or near the stop sign.

MR. DECKELBAUM: The testimony of the police officer.

THE COURT: Was that the defendant told him when he first saw the other vehicle it was 100 feet from him.

MR. DECKELBAUM: He further testified, Your Honor, that he saw a vehicle at that time but did not realize it was danger, when it was 40 or 50 feet from him.

THE COURT: Yes, but you will have to confine your hypothetical question to the exact answers that the police officer got from the defendant and then we will have to ask this witness whether, in order to form an opinion, he has to take into consideration the amount of moisture that was on the ground in view of the fact that there was no evidence about the exact amount of moisture on the ground, whether that would make any difference in you being able to express an opinion. Also, whether it would make any difference whether you would be able to express an opinion as to the fact that there is nothing to indicate there was an examination of either vehicle, the condition of either vehicle, whether that would make any difference in your being able to express an opinion.

THE WITNESS: Do you want me to answer that?

THE COURT: Yes.

57 THE WITNESS: The fact—

THE COURT: No, you don't have to go into a long dissertation. Answer whether it would make any difference in your being able to express an opinion.

THE WITNESS: No, sir, from the facts that have been given to me.

THE COURT: Well, one fact has got to be changed, first and that is with reference to when the driver, driving south, the defendant, with reference to when he first observed the plaintiff, but I am asking specifically first whether it would make any difference in you being able to express an opinion, first, with reference to, without knowing how much moisture there was on the ground, and without having examined or knowing anything about the mechanical condition of either vehicle, would that make any difference in your being able to express an opinion; answer yes, or no.

THE WITNESS: I have sufficient information to give an opinion, yes, sir.

THE COURT: Without that, you would not take that into consideration, at all, in the expression of your opinion, then?

THE WITNESS: The fact of well-defined skid marks —

THE COURT: Just answer my question, please. You would not take that into consideration, either of
58 these three factors in the expression of your opinion, and you can still express an opinion, you say, without considering those factors, the amount of moisture, the mechanical condition of each of these cars?

THE WITNESS: I can.

THE COURT: All right. We got over that. Now, on this other phase of it, you will have to reframe your question, counsel to indicate the exact answer that the officers claim the defendant gave.

As I have it in my minutes, and either one of you counsel can correct me if I am mistaken in getting this down, the answers were given rather fast and I had to write them in longhand. The testimony of the officer was that the defendant said that when he first saw the other vehicle it was 100 feet from him.

Do you agree on that?

MR. COLLINS: Yes, Your Honor.

MR. DECKELBAUM: That is correct, Your Honor.

THE COURT: That the officer also said that the defendant said he didn't realize the danger until his car was 50 feet from the point of impact; is that correct?

MR. COLLINS: That is my recollection, also.

MR. DECKELBAUM: That is correct, Your Honor.

THE COURT: And the officer's testimony was,
59 further, that the defendant stated that he was going 25 miles an hour when the defendant appreciated the danger; is that also correct?

MR. DECKELBAUM: That is correct, but I don't deem that to be a necessary part of the hypothetical.

THE COURT: I think it should be included in the hypothetical question here. And also that the defendant stated that he was 40 feet from the point of impact when he first applied his brakes.

Now, did you get all those answers?

THE WITNESS: Yes, sir.

THE COURT: You have those all clear in your mind?

THE WITNESS: Yes, sir.

THE COURT: You gentlemen agree those were the answers of the officer as he claimed were given by the defendant?

MR. COLLINS: I believe that is correct, Your Honor.

THE COURT: All right. With those corrections, assuming those facts to be true, you are now saying you can express an opinion as to the speed?

THE WITNESS: Yes, sir, minimum speed; yes, sir.

THE COURT: All right, go ahead.

BY MR. DECKELBAUM:

Q Would you tell us what the minimum speed of this Mercury vehicle was? A It would be 35 miles per hour.

60 Q What do you mean by minimum speed; would you explain your answer? A I mean that the car would come to a complete stop by force of the brakes

alone without colliding within 59 feet with a speed of 34 miles per hour. This does not take into consideration the deceleration caused by impact. This is on the assumption it would come to a complete stop by force of the brakes alone at 34 miles an hour, within 59 feet.

Q Now, I note that you used 59 feet and not 62 feet, which was the longer skid; why? A No particular reason other than that fact that I like to use the 59, it gives the benefit of three more feet.

* * * *

Q In other words, if I understand you correctly, this vehicle would have come to a stop in 59 feet without any impact of brake at 34 miles an hour? A That's correct.

Q Now, will you tell the Court and jury just what transpires when a driver observes danger and brakes to a stop such as this and lays down skid marks?

61 A Yes, sir. There are two factors of driver reaction. The firs when he perceives and realizes there is danger, there is a mental reaction. Then there is a physical reaction of placing the foot on the brakes.

These two are on the driver and the average reaction time is about three-quarters of a second, or is three-quarters of a second—this is the average. Now, once the brakes are applied vigorously, the skid mark does not appear immediately because when the vigorous application of the brakes, before the wheels stop turning, there must be heat created within and between the brakes and brake drums to lock the wheels. Once the wheels lock the skid doesn't appear immediately on the street, because, again, there must be again heat created between the friction of the bottom of the sliding tire and the surface of the street to either melt the bitumin, the tar product in the composition of the tire, or else melt the tar that is in the asphalt surface.

Now, this represents about the wheel base of the car or about ten feet and this is the best braking that the car has, this braking prior to the appearance of skid marks,

because the tires are exerting more force against the surface of the street while they are still turning, than they do after they go into a full skid.

Q Then, in measuring skid marks, you don't
62 take into consideration the wheel base of the ve-
vehicle A No, because I know there would be approximately 10 more feet of braking before the skid marks appeared and this is the best braking.

* * * *

64 Q Would you tell us what the minimum reaction time is? A The minimum would be about half a second, would be 25 feet.

Q And the maximum? A Would be as long as 50 feet.

Q How long in seconds? A That would be a full second.

Q And therefore the average would be— A Three quarters of a second or 37½ feet.

65 Q As I understand you, this reaction time is the time that elapses from the moment the operator sees the danger and then mentally goes through the process of taking his foot off the floor or off the accelerator and putting it on the brake and getting the brake to hold in locked position; is that correct? A The vigorous application of the brake which results in the skid mark.

Q And at three-quarters of a second, a car going 34 miles an hour will travel how far? A 37½ feet. That would be north of the beginning of the skid mark. I believe you asked me that, counsel.

Q In other words, how far north of the point of impact? A It would be 37½ plus—

Q Let me finish my question, Mr. Ostrom.

How far north of the point of impact, assuming the 35 feet of skid marks to the point of impact, assuming 34 miles per hour, how far north of the point of impact did the operator of the Mercury realize the danger? A 72½ feet.

MR. COLLINS: I will object to the point that he should know when this man realized the danger.

THE WITNESS: I'm sorry.

THE COURT: This is all average opinion.

66 BY MR. DECKELBAUM:

Q Mr. Ostrom, assuming the Mercury was traveling at a speed of 25 miles per hour, what is the braking distance? A It would be a maximum of 32 feet.

Q And the average reaction time in that situation? A It would be 27½ feet.

Q Or a total of 59½ feet? A That's correct.

Q In other words, in the hypothetical question that I gave you at the beginning, assuming that the defendant, the man in the Mercury, saw the danger at the same time that he saw it on what you have just testified to, but instead of going, as you testified, 34 miles per hour, he was doing 25 miles per hour, where would his vehicle come to stop with relation to the point of impact? A 13 feet short of the point of impact.

Q In other words, he would have stopped 13 feet short of the point of impact? A That's right.

Q Now, forget about reaction time and only consider the time the brakes hold at 25 miles per hour, brakes starting 35 feet from point of impact, when would the vehicle come to a stop? A Three feet short of impact.

67 Q In other words, in 32 feet, even if the reaction time is eliminated, the vehicle would still come to a stop before the impact? A Three feet short of impact, yes, sir. Of course, if the brakes hold.

THE COURT: At which speed?

THE WITNESS: 25 miles per hour, sir.

* * * *

Q Now, Mr. Ostrom, what is the significance to you of the wet surface and the statement I asked you to assume in addition to the wet surface, that the skid marks

were straight and well defined, what significance does that make to you?

* * * *

THE WITNESS: Because of the fact that there
68 are well-defined skid marks. Now, if this street had moisture on it sufficient to affect the braking, there would have been no skid marks, there would have been none there when the officer arrived. But the fact that there are well-defined skid marks indicate two things to me. One is that the brakes are in good condition, no question about that, because they locked both wheels; secondly, the surface is sufficiently dry that it exerted a good co-efficient, and a good braking surface.

BY MR. DECKELBAUM:

Q What co-efficient of friction did you use in your computation for this roadway? A I used the point 65 which is the lowest I would use, this is quite low.

Q In other words, if braking conditions were better you would have used a higher co-efficient of friction? A If this were a dry street I would have used a lower minimum; yes, sir.

Q Mr. Ostrom, I wonder if you would go to the diagram and place with this red marking pencil, place certain marks on that diagram for me.

(Whereupon, the witness left the witness stand and went to the blackboard.)

Q For the purpose of your marks, the scale is on that diagram with respect to the roadway, not to the
69 happening of the accident in the intersection, but with respect to the outline of the roadway itself, one inch equals five feet.

Now, with that red marking pencil, place an "X" at the point of impact, it being 7 feet south of the north curb and 11 feet west of the north curb. You might place the letter "A" at that point.

You have placed a letter "A" at the point of impact to scale? A Yes, sir.

Q Now, would you, from that point, go north 35 feet to scale and place the letter "B".

Now, assuming a speed of 34 miles per hour, average, and average reaction time of three-quarters of a second, the distance the vehicle would travel during that reaction time was how many feet? A 37½ feet.

Q All right. Would you go 37½ feet north of "B" and place the letter "C".

This "C" being a point at which, assuming the facts that I gave you in the hypothetical, assuming the average reaction time would be the point at which the operator of the Mercury realized the danger. A Correct.

* * * *

70 Now, would you put a figure "D" starting from a point "C", where a vehicle with average reaction time at 25 miles per hour on the surface conditions as I have given them to you, would have come to a stop? In other words, starting from "C" going out south where the vehicle at 25 miles per hour would have come to a stop.

You might put "D-1" at the place where the brakes take hold and then "D-2" where the vehicle would have come to a stop. A "D-1" is where the brakes would have started to take hold.

* * * *

73 Q Mr. Ostrom, would you take the point where the skid mark begins, which is point "B" or 35 feet north of the point of impact— A No, sir, that is more than that.

Q —35 feet north of the point of impact A That's right, in scale; yes, sir.

Q Now, would you put the letter "E" where a car at that point—where the brakes applied at 25 miles an hour would have come to a stop? In other words, forget about reaction time, but just figure the braking distance at 25

miles per hour. A That would be three feet short of impact point.

Q Three feet short of impact point? A Yes, sir.

* * * *

CROSS-EXAMINATION

BY MR. COLLINS:

Q Mr. Ostrom, where were you born? A I was born in Baker, Oregon.

74 Q Did you go to high school there? A I went to high school, yes, sir.

Q How many years of high school did you go to at Baker, Oregon? A Three and a half years.

Q You told us that you were in the Army? A I was.

Q When did you first go in the Army? A February 2nd, 1921.

Q How long were you in the Army that time? A Three years.

Q When you got out of the Army, what did you do? A I was a clerk for a period of—well, first when I got out I drove a bus for the old Capital Traction Company.

Q How long did you drive buses? A About four years.

Q You mentioned you were a clerk. A I was.

Q Where? A In a hardware store in Louisa, Virginia, worked for $13 a week.

Q When did you first go to the police force? A In '29.

Q Were you assigned to a precinct? A I was

75 assigned to a precinct for a couple of years and then I was in Traffic Division.

Q What precinct were you assigned to? A Georgetown; No. 7.

Q What type work did you do there? A General patroling.

Q Foot patrol? A Part foot patrol and part in the car.

Q You told us you were at the Licensing Bureau after that? A No, we started what we called the Collateral Desk, paying all the tickets initially at Police Traffic Bureau, Police Headquarters.

Q Where fees would be collected, the money paid on tickets? A I was down there two years and a half, if I remember right.

Q After you left there where did you go? A I went back to No. 7, made a sergeant there in 1939.

Q All right. After 1939, where did you go? A Down to No. 4 Precinct for a short period of time and then I was assigned to AIU.

Q When you went to the Accident Investigation Unit, were you a sergeant? A That's right.

76 Q You mentioned Northwestern University. Did you attend Northwestern University Traffic School? A No, they kept me too busy. I never had the opportunity. I asked for it.

THE COURT: You can answer without giving the reason; just answer the question so we can save time.

BY MR. COLLINS:

Q You didn't go to any other traffic school, did you? A Yes, I did.

Q What traffic school did you go to? A One conducted by the Three A's, out at National Training School.

Q Now, I believe you told us you went with AIU as a sergeant in 1941. After that did you go in the Army? A I went in the Service during World War II.

Q When did you go in the Army? A April 2nd, 1942.

Q How long were you in the Service? A Two years, nine months, 21 days.

Q After that you were in the Service for a while weren't you? A I was.

Q When was that? A I was a reserve officer and I was called back in 1950, December 1950.
77
Q How long were you in the Service at that time? A Four years.

Q Do you have any notes with respect to this, Officer? A Please, sir?

Q Do you have any notes with respect to your figuring or anything? A Which figuring are you talking about?

Q The figuring you are talking about here. Do you have any notes with respect to what you have done on this accident? A Yes, sir, I prepared—

Q May I look at them, please? A Oh, sure.

Q Well, these are questions and answers. A That's correct.

Q Who prepared the questions? They were questions that Mr. Deckelbaum had posed to me when he retained me last Thursday, by phone, and Friday we met, Friday morning the 22nd, and these were questions that he proposed to me. I went home and computed them and then provided him with the information over the phone.

Q These are the notes that you are talking
78 about? A Yes.

Q The questions and answers? A That's right.

Q Did you talk to any of the witnesses to this accident? A No, sir.

Q Did you talk with the police officers who investigated the accident? A Not in regard to the accident, no, sir.

Q I understand that you—strike that.

Did you secure a weather report for this day? A I did not.

Q Would you be able to tell me how much it rained that day? A No, sir.

Q Do you know what kind of tires were on the car that was being driven by Mr. Frost? A My assumption was they were average; no.

Q Do you know the kind of tires? A No.
Q Do you know how old they were? A No.
Q Do you know the weight of his car? A Yes.
79 Q What is the weight of his car? A Approximately 4150 pounds.
Q What kind of car was it? A Mercury '51 sedan.
Q Would the computations that you have given us apply to a Volkswagen? A To a Volkswagen?
Q Yes. No, sir, it was an English Ford, I believe, the other car.
Q Well, I mean, would it make any difference in your computation as to the kind of car this gentleman was driving? A No, sir.
Q So it could have been a Volkswagen? A Could have been a truck.
Q Or could have been a truck. A That's right.
Q And it could have been the big Volkswagen or the little one? A That's right.
Q Could it have been a Fiat? A It could be any type of car capable of laying down four skids from all four wheels.
Q What is the grade on these streets? A Ap-
80 proximately level, sir; I am very familiar with that intersection.
Q There are charts in the District of Columbia as to grade, aren't there? A That's right.
Q Did you consult those charts to find out precisely what the grade was? A There is not enough grade there—
THE COURT: Just answer the question.
THE WITNESS: I did not; no, sir.

BY MR. COLLINS:

Q Was there any grade from side to side of the roads? A Yes, there is a slight grade on Yuma.
Q What is that grade? A You want my opinion of the grade, sir?

Q No; did you look it up? A No, I did not.

Q Did you ever test the automobiles that were involved in this case? A I did not.

Q You never saw the tires? A I did not.

Q Did you ever test the tires? A I didn't see the cars so I couldn't have tested the tires.

81 Q You weren't engaged until last Thursday? A That's right.

Q Did you ever test this young man over here for his reaction time? A I did not.

Q Have you talked to him? A I did not.

* * * *

REDIRECT EXAMINATION

BY MR. DECKELBAUM:

Q Mr. Ostrom, does the grade from side to side on the road make any difference in your computations? A Not the grade on Yuma, it would only be the 36th Street, and that's approximately level, and of an asphalt stone mixed surface, it isn't macadam.

Q Can you state to me—

MR. COLLINS: I didn't hear that answer. Did you say it is not macadam?

THE WITNESS: It's asphalt, crushed stone, mixed.

* * * *

Q What do you base your statement on that it is
82 an asphalt mix? A This is a result of pictures which are part of my hypothetical, sir.

* * * *

83 THE COURT: You didn't listen to my question. Is it your testimony that you can give an opinion without taking into consideration what this defendant has claimed to have told the police officer, that he didn't realize the danger until he was 50 feet from point of impact, without considering that answer at all, that you

can give an opinion as to how far back he was when he realized the danger, merely from the skid marks?

THE WITNESS: That's correct.

THE COURT: This would be the maximum and the minimum averages, as I understand it?

THE WITNESS: The maximum average, and the average minimum and maximum.

* * * *

85 THE WITNESS: Then I mark this "D-2" as being the point that he would have come to a stop at 25 miles per hour, which would be 13 feet north of the point of impact by force of the brakes alone.

* * * *

89 HUGH C. FROST

was called as an adverse witness by counsel for the Plaintiff * * *

DIRECT EXAMINATION

BY MR. DECKELBAUM:

* * * *

Q Your age? A Twenty-four.

Q Your occupation? A I am in the Army.

Q You were the operator of the other vehicle involved in an accident on June 29, 1960, with Miss Siegeltuch; is that correct? A Yes.

Q As you approached the intersection of Yuma
90 Street you were on 36th Street; is that correct?
A That's right.

Q From the time you first saw Miss Siegeltuch up to the time of the accident did you blow your horn? A No.

Q Did you in any way swerve your vehicle out of the straight line of traffic it was traveling? A Not that I remember.

Q Does your vehicle have a horn? A Yes.

MR. DECKELBAUM: You may inquire.

CROSS-EXAMINATION

BY MR. COLLINS:

Q What did you do to avoid the accident? A Applied the brakes.

Q Were there other people in your car? A Yes.

Q Who else was in the car? A Mr. Jim Baden, my sister Sylvia Frost, and a girl friend of hers, a girl named Spring.

* * * *

91 BETSY ANN SIEGELTUCH

* * * *

DIRECT EXAMINATION

BY MR. DECKELBAUM:

* * * *

92 Q And your occupation? A I am a secretary-researcher.

Q For whom are you employed? A Edward P. Morgan.

Q How long have you been employed by Mr. Morgan? A Since June of 1960.

Q How old are you? A Twenty-four.

Q And you are unmarried? A Yes.

Q Directing your attention to June 29, 1960, were you involved in an accident? A Yes, I was.

Q Will you tell me where you were coming from and where you were going to at the time of the accident? A Yes. I was coming from WMAL, at 4461 Connecticut Avenue. I was going west on Yuma Street and the destination was 2400 Foxhall Road.

Q Had you been this way before? A Yes, I had.

Q And you were familiar with Yuma Street? A Yes.

* * * *

93 Q Tell us what you do remember after leaving work. A Nothing, really. The last thing I re-

member is saying good-by to my employer and telling him I would be coming back later that same evening.

* * * *

Q What is the next thing you remember after that?
A Seeing my father in the hospital.

* * * *

104 MR. DECKELBAUM: At this time I have a number of traffic regulations I would like to offer.

* * * *

105 MR. DECKELBAUM: My next offer is 22(a), which is reasonable speed.

THE COURT: I think that applies. That has to do with reasonable speed. That will be given. That will be received.

MR. DECKELBAUM: Section 22(b) 1, which is a speed of 25 miles as hour as the speed limit. That is at the bottom here.

THE COURT: You agree on that, don't you?

MR. COLLINS: Yes, sir.

* * * *

106 MR. DECKELBAUM: 22(c). That is the one on duty to slow; the portion with respect to slowing of the vehicle.

* * * *

THE COURT: I think I will receive it in evidence. I think it is for the jury. Only one part of it? You don't want the whole thing?

* * * *

107 MR. DECKELBAUM: The next one is 46(a).

THE COURT: Section 46(a). (Reading:)

"The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway."

MR. COLLINS: I don't think that is applicable. * * *

* * * *

113 Anyway, I am going to receive this in evidence. I will have to determine after I hear your argument whether I am going to submit this to the jury or not.

114 MR. DECKELBAUM: 48 is the next one.

MR. COLLINS: Your Honor, I don't know if the record reflects I object to 46(a).

THE COURT: Yes.

Section 48 reads, "Every driver of a vehicle approaching an intersection at which an official stop sign has been erected shall come to a complete stop and after having stopped shall yield the right-of-way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time that such vehicle is moving across or within the intersection."

* * * *

MR. COLLINS: I have no objection.

* * * *

MR. DECKELBAUM: 99(c).

* * * *

THE COURT: I will receive that.

* * * *

116 MR. DECKELBAUM. The last offer is 157(k).

THE COURT: 157(k). Permit to operate a motor vehicle. "No individual whose permit to operate a motor vehicle in the District of Columbia is subject to any restriction or restrictions shall operate a motor vehicle in the District unless he comply in every respect with such restriction or restrictions as may be imposed on the use of such restricted permit."

What restriction do you claim has been violated?

MR. DECKELBAUM: Failure to wear glasses.

THE COURT: I understood the restriction was lifted.

MR. DECKELBAUM: I believe it was, but at the time of the accident there was a restriction and he did not have them on.

THE COURT: I will have to give that.

MR. COLLINS: I don't think it has to do with proximate cause.

THE COURT: It is for the jury. Proximate cause is question of fact. 157(k) is received.

117 MR. COLLINS: Let the record reflect that I object to 157(k).

* * * *

119 MR. DECKELBAUM: Your Honor, with the introduction of the traffic regulations that rests plaintiffs' case.

* * * *

MR. COLLINS: May it please the Court, on behalf of the defendants at this time I move for a directed verdict in their favor.

* * * *

138 HUGH C. FROST

* * * *

139 Q We are inquiring into an accident in which you were involved with Miss Siegeltuch at this intersection of 36th and Yuma Street. At that time, at the time you were driving your father's car; correct? A Yes, sir.

Q And you had a driver's license at that time that had a restriction on it; correct? A That is correct.

Q What was the restriction? A To operate while wearing glasses.

Q When had you gotten the driver's license? A When I was 16.

Q After this accident there was a hearing of some sort, was there not? A That's right.

Q At that time were your eyes checked by the District of Columbia? A Yes, sir.

* * * *

Q As a result of that examination was the re-
140 striction on your driver's license still in effect or was it taken off? A It was taken off.

* * * *

Q About how soon after the accident? A Within a month, I would say.

* * * *

Q Hugh, when this accident happened we understand you were traveling south on 36th Street. A Yes, sir.

Q Was there someone in your car? A There were three other people.

141 Q Who else was in the car? A Jim Baden, my sister, Sylvia Frost, and a girl friend of hers named Spring.

Q Where were you coming from? A From a place called Chevy Chase Lake, where I picked up my sister and her girl friend.

Q As you came down 36th Street, did you see the other car? A Yes.

Q About how far away was the other car when you first saw it? A One hundred feet.

Q At that time where was the other car? A About the same distance from the intersection that I was.

Q Was that car on Yuma Street? A Yes, sir.

Q In what direction was it going on Yuma Street? A It was—west, I believe.

THE COURT: Pardon me, Mr. Collins. Did I understand you to say you were about 100 feet from the intersection, as was the other car?

THE WITNESS: Yes, sir.

* * * *

142 Q Did you continue on towards the intersection A Yes.

Q Did there come a time when you applied your brakes? A Yes, there did.

Q Why was it you applied your brakes? A I felt the other car wasn't going to stop for the stop sign.

Q Did the other car stop for the stop sign? A No.

Q Were the roads wet or dry? A Wet.

Q When you applied your brakes what happened? A Started to skid.

Q How soon after that did the accident happen? A Almost immediately.

Q After the accident did the police arrive? A Yes, they did.

Q Did you talk to them about the accident? A Yes, sir.

Q When you saw the other car the first time, would you be able to give us an estimate about how fast you were going? A Not an accurate one, no.

Q What is your best estimate? A I would say the speed limit.

143 Q What is that? A Twenty-five miles an hour.

Q Could you have been going more than 25 miles an hour? A Yes, sir.

* * * *

Q Mr. Frost, is it your testimony with respect to this removal of this restriction on your permit that it was after the hearing in the Corporation Counsel's Office you went down to the District and had that restriction removed? A It was during the Corporation Counsel's hearing.

Q In other words, you appeared at the Corporation Counsel's office for a hearing? A Yes.

144 Q And there was a continuation of the hearing? A Yes.

Q And in between those hearings you went down? A Yes.

Q If I told you the first hearing in the Corporation Counsel's office was not until October 21, would that mean your eyes were not examined for approximately three months after the accident? A That's a guess.

* * * *

Q Do you recall being asked the question by Mr. Korman, referring for the record, Your Honor, to page 3 of the Corporation Counsel's hearing:

"Question. Mr. Frost, you were going in this direction (indicating). Will you tell us what happened,
145 Mr. Frost?

"Answer. I was going in this direction. I was—

"Question. That is south on 36th Street.

"Answer. South on 36th Street. I had just turned on Albermarle coming down 36th Street taking some friends of mine home and I was back about, oh, when I first noticed her it was about 50 feet, 50 or 60 feet from the intersection, and I approached the intersection 25 miles per hour and she also approached."

Do you recall that testimony? A Not exactly. No.

Q Do you deny you testified on October 21, 1960; that you so testified? A I beg your pardon?

Q Do you deny on October 21, 1960, you so testified? A I did testify, yes.

Q Did you testify as I just read, or do you deny you testified that way? A I cannot be sure.

Q As you proceeded down 36th Street, were there any obstructions on the east side of 36th Street to your vision? A Not that I can recall, no.

Q Do you recall whether or not this chain link
146 fence was there at that time? A I don't believe it was.

* * * *

Q What was your speed as you entered this block immediately north of Yuma Street? A The speed limit.

* * * *

Q Where were you going? A To a friend of mine's house, Jim Baden.

* * * *

Q How were you dressed at this time? A Wearing a bathing suit.

147 Q You say you were wearing a bathing suit? A That's right.

Q Did you have any shoes on? A I don't know.

Q How about the other occupants of the car? How were they dressed? A Jim Baden, I believe he had a bathing suit on, also. My sister and her girl friend, I can't remember if they had their bathing suits on at the time, or their other clothes on.

* * * *

Q What side of 36th Street were you on as you approached Yuma Street? A The right side.

Q The right side of the street. Are you fa-

148 miliar with this area? A Yes, sir.

Q How far would you say north of Yuma Street can you see the stop sign at 36th Street? A Well, on 36th Street how far can you see it?

Q Yes. A I would say about a block.

Q When you are about a half block, how far down Yuma Street can you see? A About the same distance.

Q In other words, this house sits back and there is an open level field here (indicating on diagram)? A Yes.

Q The visibility both ways is pretty good? A Yes.

Q The first time you saw Miss Siegeltuch's car, you say you were about 100 feet from the intersection? A Yes.

Q And she was the same distance; is that correct? A Approximately.

Q What would you estimate her speed? A About the speed limit, 25.

Q Did you keep her in your line of vision? A Yes.

149 Q Did you continue to watch her? A Well, I mean—how do you mean?

Q You were approaching this intersection. Did you continue to keep your eye on her? A Well, I was aware of her, yes.

Q Did you watch her continuously or did you look at something else?

* * * *

THE WITNESS: I was looking straight ahead and she was within my vision the entire time.

* * * *

Q Now, after 100 feet how far did you travel before you realized she wasn't going to stop at the stop sign? A How far did I travel?

Q Yes. A 40 or 50 feet.

Q How far did she travel in that same period of time? A Approximately the same distance.

Q Had you changed your speed at all during that 40 or 50 feet? A No.

150 Q You hadn't increased or decreased? A Not that I remember.

Q Had she changed her speed at all? A I couldn't say.

THE COURT: Was it at that point you claim, after you traveled 40 to 50 feet that you first applied your brakes?

THE WITNESS: After traveling that far, yes.

THE COURT: Your testimony is you applied your brakes 40 or 50 feet before you came to the intersection?

THE WITNESS: No, after I first saw her.

THE COURT: And you first saw her about 100 feet from the intersection?

THE WITNESS: I first saw her about 100 feet.

THE COURT: Is that when you applied your brakes?

THE WITNESS: No, 50 or 60 feet from the intersection.

THE COURT: That is when you realized she wasn't going to stop for the stop sign?

THE WITNESS: Yes.

* * * *

151 Q You don't know whether she slowed down or not? A Not precisely, no.

Q Could she have slowed down? A It is possible.

Q Could she have been going as slow as 15 miles an hour at that point? A It is possible.

Could she have been going as slow as 10 miles an hour? A It is possible, but I don't believe so.

Q What do you believe she was doing? A About the speed limit, 25.

Q You don't believe she slowed down at all? A No.

Q You are saying she could have slowed down as slow as 15 miles an hour? A It is possible.

152 Q When you got out of the car was it raining? A I believe it just about stopped raining.

Q Did you see the skid marks the officer testified to? A Yes.

Q Did you have trouble seeing them? A I could see them.

Q Did they go up to the point of impact as the officer testified? A I don't know.

Q Now, at the time your car came to a stop after the impact, where was the left front of your car with respect to this south curb line of Yuma Street? A It hadn't quite reached that distance yet.

Q Can you tell me approximately how many feet it was from there?

* * * *

Q Did you actually see the Betsy Siegeltuch car when it passed the stop sign? A Yes.

Q You saw it drive past the stop sign? A Yes.

Q What was its speed at that time? A I would say the same speed it had been doing all along,

153 25 miles an hour.

Q At the time it passed the stop sign, where were you in relation to the intersection? A At the time it passed the stop sign?

Q Yes. How far north of the north curb line of Yuma Street were you at that time? A I was just about entering the intersection myself.

Q You say the front of your car was just about entering the intersection? A Yes, sir.

Q At that time you saw her passing the stop sign; is that correct? A Passing the stop sign, going into the intersection or—

Q (Interposing) Mr. Frost, what I am trying to find out is: Where was your car at the time you saw Miss Siegeltuch's automobile drive past the stop sign? A It was before going into the intersection.

Q It was before you entered the intersection? A Yes, sir.

Q How far before it entered the intersection? A A car length.

Q Had you already applied your brakes? A Yes, sir.

154 Q What would you estimate your speed at that time? A I couldn't.

Q You were going more or less the 25 miles an hour? A I would say less.

* * * *

Q Did you see any vehicle approaching 36th Street from the opposite direction? A I don't remember.

* * * *

Q Did you look in the opposite direction? A Yes.

* * * *

Q Was anything wrong mechanically with your vehicle? A No.

Q Your brakes were good? A Yes.

155 Q Did you have good tire treads on that car? A Yes, sir.

Q You didn't have anything wrong with you physically? A No.

* * * *

SYLVIA FROST

* * * *

DIRECT EXAMINATION

BY MR. COLLINS:

* * * *

156 Q Do you remember riding in a car on 36th Street one day when your brother was involved in an accident? A Yes.

Q Where were you seated in that car? A On the back seat behind him.

Q Behind whom? A Behind my brother.

* * * *

157 Q Did you see the other car that was involved in the accident before the accident? A I think I did, yes.

Q Where was that car when you saw it?

MR. DECKELBAUM: I object; if it was only a thought. She saw it or she didn't see it.

THE COURT: You can't speculate or guess about it. The question is whether you did see it or not.

THE WITNESS: Yes.

BY MR. COLLINS:

Q Where was the other car when you saw it? A It was coming up Yuma.

Q Did you continue to watch that car? A No.

Q Did your brother—Did the brakes on your car go on? A I don't know.

Q Do you know whether there is a stop sign on Yuma Street? A Yes, there was.

Q Where was this other car in relation to the stop sign when you did see it? A You mean when
158 it was coming down?

Q Yes. A I really don't know.

* * * *

Q After the accident, and your car came to a stop, was it still in the intersection or out of the intersection? A Yes. If I remember right it was sort of in between.

Q What do you mean by in between? A It was—if I remember rightly it was sort of—half the car was in the intersection and it was going—in Yuma Street—.

* * * *

159 GWYN SPRING

* * * *

DIRECT EXAMINATION

BY MR. COLLINS:

* * * *

Q Where do you go to school? A Woodrow Wilson High School.

Q Do you know Miss Sylvia Frost? A Yes, I do.

Q Do you recall a day when you were riding
160 in an automobile with Hugh Frost when he was involved in an accident at 36th and Yuma Street? A Yes.

Q Where were you riding in the car? A In the back seat on the right side.

* * * *

Q Before the accident did you see the other car that was involved in the accident? A Yes, I did.

Q Where was that car? A That car was coming from the left.

Q What street was that on? A I don't remember.

Q About how far away was your car from the intersection—strike that.

Did the accident happen in the intersection? A Yes, it did.

Q About how far away was your car from the intersection when you saw the other car? A About a
161 third of a block, a city block.

Q About how far away was that car away from the intersection? A About the same.

Q Did you continue to watch the other car? A Yes, I did.

Q Did you watch it right up to the time of the accident? A Yes.

Q Did you notice whether that car stopped at any time? A No, it didn't.

Q It did not? A No.

Q Were the brakes applied in your car? A I don't know.

Q Do you know whether there was a stop sign on the other street? A Yes.

Q Did you know that before the accident? A Yes, I did.

Q That car did not stop? A No.

* * * *

162 CROSS-EXAMINATION

BY MR. DECKELBAUM:

Q I don't believe Mr. Collins asked you how old you are, Gwyn? A Seventeen.

Q At the time you first observed this other car, did you have any estimate how fast the car in which you were in was going? A About 25 miles per hour.

How fast would you estimate the other car on Yuma Street to be going? A About the same.

Q Incidentally, what were you wearing at this time in the automobile? A I had Bermudas on, shoes, socks, and blouse.

* * * *

Q Did you ever say anything to anyone in this automobile about seeing this other car? A No.

163 As you first saw it? A No, I didn't say anything.

Q When did you first realize the accident was going to happen? A Well, just as we both approached the corner I realized it.

Q How close were you to the corner when you realized the accident was going to happen? A Several yards away, I guess.

Q Had the car in which you were riding started to slow down at the time you realized the accident was going to happen? A I don't know.

Q Did you feel any change in speed at any time prior to impact in the car in which you were riding? A I couldn't say.

Q You don't recall any sudden slowing down of the car prior to impact? A No.

Q Were you doing anything in the car as you approached Yuma Street? A No.

Q Just sitting? A Yes.

164 Q Was any conversation going on? A There may have been; I don't recall.

Q As I recall, you were seated on the right side? A Yes.

Q In the rear? A Yes.

Q Did you have any difficulty seeing through the car and across the intersection and a third of the way up Yuma Street? A I don't think so.

Q Did you continue to keep this car on Yuma Street in your vision? A Yes.

Q Did you ever say anything to anyone else in the

car about the car on Yuma Street is going to run the stop sign? A No.

Q Did you say anything as it ran the stop sign? A No.

Q Did the car on Yuma Street change its speed at all while you had it in your vision? A No.

* * * *

165 Q What was the weather condition at the time of this accident? A Raining.

Q Were the streets dry or wet? A Damp.

Q Did you observe any cars approaching 36th Street on Yuma Street from the opposite direction? A No.

Q Did you look in that direction also? A No.

Q Did you notice whether there were any cars coming in the opposite direction on 36th Street coming towards you on 36th Street? A No.

Q Did you look? A No.

166 Q Did you observe whether or not there were any cars parked along the curb on 36th Street? A No.

Q You don't know whether there were any cars on either side? A I don't know.

* * * *

167 JAMES BADEN

* * * *

DIRECT EXAMINATION

BY MR. COLLINS:

* * * *

168 Q Do you recall riding in an automobile with him when he was involved in an accident at 36th and Yuma Streets? A I do.

* * * *

Q Do you recall in fact where this accident happened? A At 36th and Yuma Street.

Q Did the accident happen in the intersection? A It did.

Q Did you see the other car involved before the accident? A I guess I was about 30 feet from the
169 intersection when I saw the other car.

Q You mean the car you were in was 30 feet from the intersection? A Yes.

Q Where was the other car? A It was just about up to the stop sign at the intersection.

Q Was that car moving or stopping at that time? A Moving.

Q Did you continue to watch that car, the other car? A I did.

Q Did you notice whether it stopped or not? A It did not stop.

Q Were the brakes applied in the car in which you were riding? A I guess it was applied about the same time as I saw the car that was coming through the intersection; at the same time I saw it, that it wasn't going to stop for the stop sign.

Q Coming through the intersection or stop sign? A Coming through the stop sign.

Q Did you do anything when that happened? A I grabbed the dashboard and said, "Watch out."

Q Were the brakes on then? A They were applied about the same time as I grabbed the dashboard.
170 Did your car skid? A I don't know whether it skidded or not.

* * * *

CROSS-EXAMINATION

BY MR. DECKELBAUM:

Q Mr. Braden, do you recall where your car got onto 36th Street? A No, I don't.
171 Q Do you know approximately how many blocks you had been traveling along 36th Street? A I don't know whether we came in on it from 36th Street

where it runs into Connecticut Avenue or whether we came up Albemarle Street and got on it.

Q You weren't paying particular attention to the operation of the automobile? A I wasn't driving at the time.

Q So you were not paying particular attention to the operation of the vehicle; is that correct? A No, I wasn't.

Q Was there any conversation going on in the car just prior to this accident? A I don't think so; I don't remember.

* * * *

Q How old are you?

* * * *

172 Q At the time of the accident you had been operating a motor vehicle approximately seven years? A Right.

Q Can you give me your estimate of the speed of the car you were in as you approached Yuma Street? A I estimate it about 25 miles an hour.

* * * *

Q Do you recall crossing the intersection just north of Yuma Street? A I don't recall whether we crossed it or not.

Q Do you recall traveling south from that point to Yuma Street? A Right.

Q At the time you first recall, what was the speed of Mr. Frost's vehicle? A About 25 miles an hour.

Q Did that speed vary any up to the point that you saw the other car?

In other words, did Mr. Frost's speed increase or decrease any up to that point? A You mean from the time we saw the car until the time we hit it?

173 Q From the time you first recall being in the block prior to Yuma Street—Let me see if I can make myself clear.

This is 36th Street. You were coming down this way, heading south? A Right.

Q You testified approximately 30 feet from this intersection your car started braking; is that correct? A Uh-huh.

* * * *

Q What would you say the maximum speed was from the time you got south of Albemarle Street to the time you started braking for this eventual accident? A I venture we weren't doing over 25.

174 Q Could it have been going 30? A At the very most it would be 30.

Q Couldn't be going 34? A No.

Q Are you positive of that? A Positive.

Q Did you ever look at the speedometer? A No, I didn't.

Q You said when you were about 30 feet from the intersection you saw Miss Siegeltuch's vehicle on Yuma Street; is that correct? A Correct.

Q What had you been doing just prior to that? A Looking out the front window, I guess.

Q Did you look to your right on Yuma Street? A To the right? Not that I can remember.

Q You were seated on the righthand side of the car? A Right.

Q You don't recall looking to the right? A No. I don't recall looking to the right.

Q You don't recall if there was any vehicle proceeding east on Yuma Street or not? A No, I don't know.

175 Q How far down Yuma Street could you see at this point 30 feet north of Yuma Street? A How far—you mean going east—how far down Yuma Street we could see going east?

Q That's right. Let me make my question clear.

At a point 30 feet north of here, where you first saw Miss Siegeltuch, and I believe you said she was passing the stop sign at that point? A Right.

Q How far farther down Yuma Street could you see? A Oh, I guess about a quarter of a block, I guess, or a fifth of a block. About 50 feet.

Q Just about 50 feet? A Forty or fifty feet. Somewhere in there.

Q Did you look down Yuma Street at any time prior to that? Prior to the time you were 30 feet from the intersection, did you ever look down Yuma Street before that? A Before—no—I don't know whether I did or not. I was looking in that direction.

Q In other words, you don't ever recall looking down Yuma Street until the exact moment the Siegeltuch automobile was passing the stop sign? A No, I don't.

* * * *

176 Q Can you tell me, coming down 36th Street, and if you were about three times as far as you were when you looked, 90 to 100 feet north of Yuma Street, can you tell me how far down Yuma Street you could see at that point? A You mean going towards Connecticut Avenue?

Q Yes. A I guess you could see down there 50 or 60 feet. As I remember there is nothing on that corner there to obstruct your view on seeing.

* * * *

Q How fast would you estimate the car you were in was traveling at the time of impact? A It happened so fast I guess about 15 miles an hour. Somewhere along there.

* * * *

180 MR. COLLINS: At this time, Your Honor, on behalf of the defendants, I should like to offer Traffic Regulation 46(b).

* * * *

THE COURT: That will be received.

* * * *

191 MR. DECKELBAUM: May it please the Court, ladies and gentlemen of the jury: At this time the plaintiff is going to put in evidence the deposition of Mr. B. Manly Parks, a deposition that was taken prior to trial by Mr. Collins' firm on behalf of the defendant. However, he has failed to put it in and at this time I am putting it in as rebuttal.

* * * *

"Q Will you state your full name, please? A My full name is Basil Manly Parks the Second.

* * * *

Q Are you living outside of the Washington Metropolitan area? A I am going to school at the Mili-
192 tary Academy at West Point.

* * * *

194 Q Are you here today, sir, at my request to take your deposition? A Yes, I am.

Q I wrote to you at West Point and asked you what date you would be in Washington? A Yes, you did.

Q And in answer to my letter you wrote back and said you would be here over Christmas and you would appreciate it if we could schedule your deposition for today, is that right? A That is correct, sir.

Q You also know, do you not, that I represent the defendants in this case? A Yes, I do.

* * * *

195 Q Directing your attention to June 29th, 1960, Mr. Parks, did you have occasion to be in the area of Yuma and 36th Street that day? A Yes, I did.

Q What time of the day were you in that area? A I was in that area a little after 6:00 o'clock.

Q Did you witness anything unusual when you were there that day? A I witnessed an accident at the intersection of 36th and Yuma.

Q All right. From what position did you witness it? Where were you? A I was in an automobile travel-

ing east on Yuma and I had just pulled up to or was approaching the stop sign on Yuma Street and I witnessed the accident in the intersection.

Q Are there stop signs to your knowledge directing the easterly flow of traffic and the westerly flow of traffic also on Yuma? A Yes, there are.

Q Are there any stop signs directing the north
196 and south flow of traffic on 36th Street or were there on June 29th, 1960? A There were not.

* * * *

Q Now, will you describe for me the kind of cars that were in the accident? A The car traveling on Yuma Street was a small foreign make, blue, what you call "economy" car. The car traveling on 36th Street was a dull black American car, either a Mercury or a Lincoln, one of the Ford Motor Company vehicles, and there was nothing unusual about it as far as that goes.

Q I see. What direction was the car on 36th Street going before the accident? A The car on 36th Street was traveling south.

Q South. You were headed east on Yuma, is that right? A That is correct.

Q And in what direction was this foreign car headed on Yuma? A The foreign car was heading west.

Q As you drove towards 36th Street, the black
197 car would be coming from your left to your right, is that correct? A That is correct, sir.

Q How far back from the intersection was that car when you noticed it the first time? A About 250 yards, sir.

Q Did you notice anything unusual about its speed, for example? A I noticed nothing unusual about it.

Q Now, after you pulled up to the intersection, did you stop at the stop sign? A I stopped at the stop sign, yes. I stopped back from the stop sign. The accident occurred before I had actually reached the stop sign, about ten feet before.

Q When was the first time you noticed the other car going west on Yuma? A The blue, economy car was accelerating into the intersection when I first noticed it.

Q Now, at that point, sir, where was this black car? Coming down 36th Street? A The black car was in the collision course. It was, I would say, ten or twenty yards from the blue car.

* * * *

198 Q At the time of this accident, sir, on the northeast corner of 36th and Yuma, that is to the right of the blue car at it was stopped on Yuma, was there any obstruction to prevent the person from looking up 36th Street? A No, there was not.

* * * *

Q You say the first time you noticed this car was when you noticed it accelerating across the intersection, is that correct? A That is true, sir.

199 Q When you saw that car coming out, sir, did you expect an accident? A Yes, I did.

* * * *

200 Q Did you speak with the driver of the black car? A Yes, I did.

Q On the scene? Yes, I did.

Q Did you ever find out what his name was? A No, I didn't.

Q Does the name "Hugh Frost" refresh your recollection? Or mean anything to you? A I heard that that is the name.

Q Did you tell Hugh Frost on the scene that you saw this English car, the blue car run a stop sign? A I didn't tell him that I had seen the English car run the stop sign, but I told him that I caw the English car pull out in front of him.

Q Would that be your present testimony, that you didn't see it run the stop sign? A That is true. That is my present testimony.

Q But you saw it pull out in front of you? A That's right, sir.

* * * *

201 Q The plaintiffs' attorney who sits here today? Did you give him a statement about the accident, sir? A Yes, I did.

Q Was that a written statement? A Yes, it was.

Q Did you sign it? A Yes, I did.

Q Did you say anything in that statement to Mr. Cohen different from what you have told us here today? As far as you remember? A I did not.

* * * *

Q All right. At any time prior to the collision, sir, did you notice anything unusual about the speed of the black car? That is the one on 36th Street? A No, I didn't.

Q To the best of your recollection was it driving to the right of the center of the highway? A To the best of my recollection it was driving on its side of the road.

* * * *

202 Q Did you check to see whether or not the gear-shift was in any particular gear, first, second or third or fourth? A No, I did not.

* * * *

Q Do you have any indication of whether it was? A I believe I heard some one say that it was the second gear. I am not sure about this, though.

* * * *

203 Q Do you remember who said it? A I believe it was—Yes, it was the man who got the statement from me on your side of the case. The man who got the statement from me at West Point.

Q Was he the one that said the car was in second gear or that he thought the car was in second gear? A He said that the car was in some gear. It was either

first or second and I don't remember which one it was. I wish I did.

* * * *

MR. DECKELBAUM: This concluded the examination by Mr. Webster on behalf of the defendants. Mr. Cohen is now examining on behalf of the plaintiff:

"Q Just a couple of questions, Mr. Parks.
204 Shortly after the accident you gave me a written statement, did you not? A That is true, sir.

Q And subsequently how many written statements have you given? A I have given one other statement, sir.

Q And you told us that the only other written statement you have given was the one you just mentioned, at West Point? A The one I gave at West Point, sir.

Q Tell us about the circumstances of that written statement. A How do you mean, sir, "circumstances"?

Q Simply this: What were the preliminaries to the written statement? Was there a correspondence, was there a telephone call, was there an appointment made? By whom, when and where was the statement taken? A I received a phone call and we arranged for the statement by phone.

* * * *

205 Q Do you know how he represented himself?
A He was a representative of the defendant.

Q And he told you that? A Yes, sir, that is what he was.

* * * *

Q How did he identify himself to you? A As——

MR. WEBSTER: I object. He has already answered.

THE WITNESS: He identified himself further by saying that he worked for a retired general officer which I knew personally.

* * * *

206 Q May I see it, please?

Now, during the direct examination you referred to the Ford make automobile as a dull, black, is that correct? A That's correct, sir.

Q And what was the visibility at the time of the
207 accident? A It was the normal visibility on a hazy summer day around 6:15 in the evening.

Q Do you remember discussing with me the relationship between the color of the Mercury and the asphalt pavement? A I do, sir.

Q What comment did you make then? A I made the statement that it appeared to me that the woman driver of the blue car did not see the black car and that this possibiy could b·ave been due to the fact that the black car was approximately the color of the asphalt.

Q Did you use the word "blended"? A "Blended" I did use.

Q "Blended with the color of the road"? A I did use that word.

Q Now, you testified that the small, blue car accelerated into the intersection? A That is correct, sir.

Q It follows from that, of course, when you use the word "accelerated," that it went from a slower speed to a faster speed? A Yes, sir.

Q Was it your impression that the blue car
208 had stopped and then went into the speed following stop? A I couldn't give you an impression of that. I do know that it was going from slower to faster. I believe that the car could have stopped and reached that acceleration or it could have just changed gears and reached that acceleration. I couldn't say one way or the other, whether the car came to a complete stop.

Q When you talked with me you estimated the speed of the Mercury, did you not? A Yes, I believe I did. Yes, I did.

Q Did you at first say that it was thirty to thirty-five miles an hour and then you said on reflexion that it was thirty miles on hour?

When you talked with me, was it your impression that when you observed the Mercury going south on 36th Street it had what you estimated to be a speed of thirty to thirty-five miles an hour, which you later on, on reflexion changed to thirty miles an hour? A The
209 estimation that I made was between thirty and thirty-five miles and on reflexion around thirty miles an hour. I based this on a normal rate of speed that the black car was traveling. I made this estimation from my initial view of the car, the first time I saw the car.

I figured it was—in retrospect, after the accident occurred, looking back to the time I first saw the car—I figured around thirty, about thirty-five miles an hour, probably closer to thirty.

* * * *

210 "Q You stated, Mr. Parks, that it didn't appear to you that the driver of the English Ford ever saw the black car, is that correct? A That is
211 correct, sir.

Q Why do you say that? A Well, I base that on the amount of driving I have done and I base it on the fact that she was looking straight ahead as she went across the intersection and I base that on the fact that a sane person wouldn't pull out in front of an oncoming car so that the car would hit her.

Q You also stated that one of the reasons why maybe she didn't see this other car was possibly that the black car blended with the black asphalt road? A That's right, sir, the black car wasn't a shiny black, it was a dull black.

* * * *

Q Now, this estimate as to speed. When you gave this estimate before, you said that that was when you first noticed the car? A That's right, sir.

Q That was about 250 yards back from the
212 intersection? A That's right, sir.

Q You had no difficulty seeing it at that distance, is that correct? A The car?

Q Yes. A I had no difficulty, sir.

Q Is there any sort of a crest of a hill at this intersection? A No, sir.

* * * *

Q Now, had it been raining that day at all; as far as you remember? A I don't recall any rain.

Q Were the streets dry or wet if you remember? A I remember them as dry.

Q Aside from what your recollection was, at the present time, today do you have an estimate of the speed of the speed of the black car when you first saw
213 it? A I will stick with my same estimation, sir.

Q That is thirty miles an hour? A Yes.

* * * *

Q How fast was the blue car moving at the time of the accident? A It was accelerating, sir. It is pretty hard to judge a car's speed when it is accelerating.

Q Was it accelerating quickly? A I believe it was, sir, traveling pretty close to the maximum acceleration for that type of a vehicle.

Q Would it be fair to say that it shot out into the intersection? A It would be fair to say that, sir."

* * * *

216 (Statement of B. M. Parks was marked Plaintiffs' Exhibit No. 17 and received in evidence for limited purpose.)

* * * *

217 "July 14, 1960, statement of Basil M. Parks.

On June 29, Wednesday, about 6:15 p.m., I was driving a car on Yuma Street headed east. I observed a car, light blue, headed west, some feet

before she approached the stop sign. I observed a Mercury going south on 36th Street at an estimated speed of 30, and there is 35 scratched out, miles per hour. There is then the words he continued south which is scratched out. The Mercury continued south on 36th Street and did not appear to slow down. Then the words or slacken its speed which is stricken, until it struck the small blue car. The Mercury struck the blue car broadside on the right side square in the middle. The Mercury was not in the curb lane, possibly because of a parked car but was in the inside lane of 36th Street and the light blue car was in the curb lane on her side of the road. I was headed in the opposite direction and she would have cleared me comfortably. It was then there is a word stricken which I can't make out, at which light, then the words visibility was poor
218 is stricken. The Mercury was the same color as the asphalt, a gray color, and the Mercury may well have blended with the color of the road."

"I have read the statement of two pages and it is true and signed B. M. Parks the Second."

* * * *

221 MR. DECKELBAUM: At this time, ladies and gentlemen, I would like to read to you a portion of the transcript of the Corporation Counsel hearing taken on the 21st day of October, 1960.

This starts out, Examination by Corporation Counsel, by Mr. Coleman:

"Question. Mr. Frost, you were going in this direction (indicating). Will you tell us what
222 happened, Mr. Frost?

"Answer. I was going in this direction.

"Question. That is south on 36th Street?

"Answer. South on 36th Street, and I just turned on Albermarle coming down 36th, taking some friends of mine home. I was back, oh, when I first noticed her, it was about fifty feet, fifty or sixty feet from the intersection, and I approached the intersection at 25 miles an hour. She approached also. I got within a car length or so from the intersection when I

realized she wasn't going to stop so I applied my brakes and we came together like that."

* * * *

* * * Plaintiff rests, * * *

* * * *

223 THE COURT: While you are up here you might as well make your motion, Mr. Collins, that I anticipate you will make.

Do you renew your motion for directed verdict on the same grounds as previously stated?

MR. COLLINS: I do, Your Honor.

* * * *

226 I will give the last clear chance doctrine in the Court's language. The Court of Appeals approved my last clear chance case, so I have got to go on that.

MR. COLLINS: Your Honor, may the record indicate that I object to the doctrine of last clear chance?

THE COURT: Certainly. I assume after I give it you will still object to it, anyway.

MR. COLLINS: I thought I better mention it. Your Honor ruled that the regulation with respect to
227 the blowing of the horn was not admissible?

THE COURT. But that may be argued on the common law doctrine of negligence. I can't stop argument as to that.

MR. COLLINS: Your Honor, it was not claimed anywhere in the pre-trial, even though they may claim something in common law they still have to set it forth in pre-trial.

THE COURT: I hadn't thought of that.

MR. DECKELBAUM: May I say, Your Honor, we claimed the doctrine of last clear chance, and hornblowing and swerving is as a result of the last clear chance. It is not a question of criminal negligence, it is a question of last clear chance.

THE COURT: They didn't claim it as a part of negligence, but they claim last clear chance. Well, we better

let him argue, I don't think that is going to determine the lawsuit.

* * * *

233 JURY CHARGE

* * * *

259 If, on the other hand, members of the jury, plaintiff has proved by a fair preponderance of the evidence that the defendant was negligent and the defendant's negligence was the proximate cause of plaintiff's injuries and damages, and the defendant has proved by a fair preponderance of the evidence the contributory negligence of the plaintiff, then you would come to the doctrine of last clear chance, and this, at this juncture, the Court is required to define for you what is meant by last clear chance.

The elements of last clear chance are as follows:

First, that plaintiff was in a position of danger caused by the negligence of both plaintiff and defendant.

Second, that plaintiff was oblivious of the danger or unable to extricate herself from the position of danger.

Third, that the defendant was aware or by the exercise of reasonable care should have been aware of plaintiff's danger and obliviousness or inability to extricate herself from the danger;

Four, that the defendant with means available to him was by the exercise of reasonable care able to avoid striking plaintiff after he became aware or by the

260 exercise of reasonable care should have been aware of the latter's danger and inability to extricate herself from danger and failed to do so.

With reference to this issue, namely, that of last clear chance, if you come to this issue, members of the jury, plaintiff has the burden of proving by a fair preponderance of the evidence each of the elements of the last clear chance doctrine as I have just defined it to you.

It is plaintiff's contention that the defendant discovered the danger or by the exercise of reasonable care

should have discovered the danger that would be involved if he didn't sound his horn and bring his automobile to a stop as rapidly as was possible, and that by doing so could have avoided the impact, and that plaintiff has proved all the elements of last clear chance as defined by the Court.

On the other hand, the defendant asserts that the respective automobiles were so close to the intersection so that when defenndant first observed that plaintiff was not going to stop for the stop sign, and yield the right-of-way to the defendant, and that therefore a danger existed, there was nothing for defendant to do that he did not do and that he applied his brakes and did everything that a reasonably prudent person could have done to avoid the impact, and that plaintiff has failed to prove by a
261 fair preponderance of the evidence all of the elements of the last clear chance doctrine as given to you by the Court. And the defendant asserts, therefore, that the last clear chance doctrine does not apply to this case.

Therefore, members of the jury, even assuming there was negligence on the part of both defendant and the plaintiff, if the plaintiff has failed to prove by a fair preponderance of the evidence each of the elements of the last clear chance doctrine as given you by the Court, then your deliberations would end and your verdict would be for the defendant in this case.

If, however, you have concluded that there was negligence on the part of both plaintiff and the defendant, which proximately concurred in causing this impact and that plaintiff has proved by a fair preponderance of the evidence each of the elements of the last clear chance doctrine as I have defined it to you, then you will come to the issue of damages in this case.

* * * *

265 The Court is submitting to you in this case, members of the jury, instead of a general verdict,

certain interrogatories for you to answer, three special interrogatories. Now, I want to explain them to you.

The first question for you to answer will be this:

Has the plaintiff proved by a fair preponderance of the evidence that defendant was negligent, and that such negligence was the proximate cause of the accident?

There is the word "yes" and a blank line and the word "no" and a blank line, after that question.

If the first question is answered no, then your verdict would be for the defendant and you would not have to answer the other two questions submitted to you for your answer.

If the first question is answered yes, then you
266 would go to the second question which is this:

Has the defendant proved by a fair preponderance of the evidence that plaintiff was contributorily negligent?

If the second question is answered no, then the jury would go to the issue of damages and would not have to consider the third question.

The third question reads as follows:

Has the plaintiff proved by a fair preponderance of the evidence that the defendant had the "last clear chance" to avoid the accident under the instructions of the Court?

Now, if the second question is answered yes, then you would go to the third question.

* * * *

269 MR. COLLINS: I would just like the record to reflect that I object to Your Honor's instructing on traffic regulations 157(k) for reasons previously stated.

270 THE COURT: Yes.

MR. COLLINS: Also 46(a), for reasons previously stated; also on last clear chance. And I also object to the peculiarly available instruction as I think I have mentioned before.

* * * *

BRIEF OF APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,984

ALBERT C. FROST, et al.,

Appellants,

v.

COOPER P. BENEDICT, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD MARGOLIUS
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STATEMENT OF QUESTION PRESENTED

The question is whether there was sufficient evidence of the defendant's having a last clear chance to avoid the accident so as to be proper for the trial court to submit the issue of last clear chance to the jury and having so submitted the issue to the jury properly, the trial court correctly denied defendant's motion for Judgment N.O.V.

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* Cases chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLEES

COUNTER STATEMENT OF CASE

Appellee, Betsy Ann Siegeltuch, a young lady 24 years of age, employed as a secretary and researcher, brought this action for personal injuries she sustained in an automobile accident on June 29, 1960 while on her way home from her place of employment, following a route she frequently followed on previous occasions and one with which she was familiar (JA 50A). While proceeding west on Yuma Street, her vehicle

was struck on the right side by the appellant's vehicle which was proceeding south on 36th Street, N.W., in the District of Columbia. The accident occurred shortly after 6:00 P.M., and the streets at the time of the accident were dry or damp. Yuma Street, traffic east and west bound, at the intersection of 36th Street, is controlled by stop signs. As a result of the accident, the appellee Betsy Ann Siegeltuch was rendered unconscious (J.A. 29 A), and sustained a cerebral concussion, an acute flexion extension injury to her neck and a loss or perversion of her sense of smell. As a result of the injuries, appellee had amnesia with respect to the facts of the accident and certain circumstances and facts occurring immediately prior thereto (JA 29 A, 30A). The appellee's last recollection prior to the accident was leaving her place of employment; the first recollection after the accident was seeing her father in the hospital several hours later (JA 50 A, 51 A).

Officer Thomas Mangum, a police officer assigned to the Accident Investigation Unit with 13 years of experience, was called by appellee and testified that when he arrived at the scene, he found both vehicles involved in the accident were still in the roadway, that appellee's English Ford was on the sidewalk up against a stop sign (at the southwest corner of the intersection facing in the opposite direction from which it had been traveling), and appellant's Mercury was at a stop in the roadway. Yuma Street was 30 feet wide and 36th Street was 26 feet wide. From the skid marks and brush marks in the roadway, he established the point of impact between the two vehicles as being 7 feet south of the north curbline extended of Yuma Street and 11 feet west of the east curb of 36th Street (JA 22 A, 23 A), that the appellant's vehicle had laid down well defined skid marks, 35 feet to the point of impact and continuing on the right skid 24 feet beyond the point of impact and continuing on the left skid 27 feet beyond the point of impact, and that the car had turned slightly when it came to rest.

An examination by Officer Mangum of the two vehicles revealed that there were no mechanical defects with respect to either vehicle prior to the accident and that the physical and mental condition of appellant was normal and that the appellee was unconscious at the time he arrived on the scene. At the scene of the accident, he questioned the appellant who advised him that when he first saw the other vehicle, it was 100 feet from him, that he did not realize there was any danger until he was about 50 feet from the vehicle, and that his speed at this latter moment was 25 miles per hour. The officer stated that the appellant said he applied his brakes when he was about 40 feet from the place of impact, and that he did not know his speed at the time of impact (JA 24 A, 25 A). A number of photographs were introduced and identified showing the position and damage to appellee's vehicle (plaintiff's Exhibits Nos. 1 through 12) (JA 26 A). He also identified plaintiff's Exhibits 13 and 14 as being photographs of 36th Street and Yuma Street (JA 27 A).

Appellant at the time of the accident was not wearing glasses, and his permit required him to operate only while wearing glasses (JA 28 A).

Walter Roy Ostrom, a traffic accident analyst and consultant, was called by the appellee and qualified as an expert (JA 31 A, 33 A), and after being given a hypothetical question and being shown pictures which had been introduced into evidence (plaintiff's Exhibits 1 through 14), testified that, based upon all of the facts of the hypothetical question, the minimum speed of appellant's vehicle was 34 miles per hour, that a vehicle under all of the circumstances and conditions as given to him, traveling at a speed of 34 miles per hour, would have come to a stop after laying down 59 feet of well defined skid marks without an impact as occurred here, that appellant had laid down 35 feet of skid marks prior to the impact and a minimum of 24 feet of skid marks after the point of impact, or a total of 59 feet (JA 38 A, 39 A), that based upon the average reaction time of three quarters of a second, the appellant

observed the danger and started to apply his brakes at a distance of 72 1/2 feet north of the point of impact (JA 40 A).

Mr. Ostrom further testified that in his opinion, if the vehicle were going only 25 miles per hour, the vehicle would come to a complete stop in 59 1/2 feet, including reaction time, which meant that if the appellant had seen the danger at the same point, he would have stopped 13 feet short of the point of impact, or eliminating reaction time, if his brakes had applied at the same point which they did apply, he would have stopped 3 feet short of the point of impact (JA 41 A). Mr. Ostrom testified that he used a very low coefficient of friction in determining braking distance and because of the fact that the skid marks were well defined, the amount of moisture on the road would not affect in any way his determination (JA 43 A).

The appellant, a 24 year old soldier, testified that from the time he first saw the appellee up until the time of the impact, he did not blow his horn, even though his vehicle was equipped with a horn (JA 49 A). He stated that on the day in question, he was proceeding from Chevy Chase Lake together with his friend, Jim Baden, his sister, Sylvia Frost, and a girlfriend of hers, Gwen Spring, that he and Jim Baden were wearing bathing suits and no shoes, and that the girls, seated in the rear of the car, were probably wearing bathing suits (JA 57 A). He said that when he was 100 feet from the intersection and doing 25 miles an hour, he observed appellee at the same distance from the intersection as he was, and at approximately the same speed (JA 54 A, 55 A), that he did not recall testifying at the Corporation Counsel hearing on October 21, 1960, shortly after the accident, that when he first noticed appellee, he was 50 or 60 feet from the intersection. Appellant testified that there were no obstructions to his vision and that one could see from quite a distance north of Yuma Street (approximately 1 block) to quite a distance east on Yuma Street as he proceeded south, and that he continued to watch appellee from the time he first saw her up until the point

of impact (JA 58 A). He testified that he saw no other vehicles or traffic entering the intersection and, in fact, was not even aware that a witness, B. Manly Parks, was proceeding in an easterly direction on Yuma Street. His vehicle was in good mechanical condition and he was in good physical condition (JA 61 A). Two of the three passengers in appellant's car testified they observed the appellee go through the stop sign but none of them gave any warning or made any remark whatsoever to appellant. They knew very little about anything except for the single isolated fact that appellee passed the stop sign. In fact, one of the young girls observed the appellee one third of a block from the intersection in front and on the left of her while seated in the right rear of the automobile and kept the appellee in sight at all times up to the collision (JA 63 A).

TRAFFIC REGULATIONS INVOLVED

Traffic and motor vehicle regulations of the District of Columbia, Section 22(a):

> "No person shall drive a vehicle on a street or highway at a speed greater than is reasonable or prudent under the conditions and having regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the street or highway in compliance with the legal requirements and the duty of all persons to use due care."

Section 22(b):

> "Where no special hazard exists, there requires lower speed in compliance with (a) of this section, the speed of any vehicle not in excess of the limits specified in this Section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this section or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful. 1. 25 miles per hour unless otherwise designated by official signs, . . . :"

Section 22(c):

> "The driver of every vehicle shall, consistent with the requirements of (a), drive at an appropriate reduced speed when approaching and crossing an intersection or railway, grade crossing, when approaching and going around a curve, when approaching a hillcrest, when traveling upon any narrow or winding roadway, when special hazard exists with respect to pedestrians or other traffic, or by reason of weather or highway conditions."

Section 46(a):

> "The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway."

Section 99(c):

> "An operator shall, when operating a vehicle, give his full time and attention to the operating of the same."

Section 157(k):

> "Permit to operate a motor vehicle: No individual whose permit to operate a motor vehicle in the District of Columbia subject to any restriction or restrictions shall operate a motor vehicle in the District of Columbia unless he complies in every respect with such restriction or restrictions which may be imposed on the use of such restricted permit."

SUMMARY OF ARGUMENT

The doctrine of last clear chance was applicable in this case, in view of the fact that the facts presented to the trial court showed that there were two things, viz: blow his horn or swerve, that appellant could have done to have avoided the accident after becoming aware, or after he should have become aware, of the appellee's perilous position. The mere fact that appellant applied his brakes and did not do what he reasonably should have done in addition to applying his brakes, should not excuse him from responsibility in this accident. There was ample evidence upon which the trial court could base its instruction of last clear chance.

ARGUMENT

The essential elements of the doctrine of last clear chance, as set down by numerous decisions of this Court, for this jurisdiction, are not in dispute in this case. The question before this Court is whether or not there were any facts in evidence, whether produced by appellee or appellant, upon which the instruction could be submitted to the jury. Jackson v. Capital Transit Co., 69 U.S. App. D.C. 147, 148 , 99 F.2d 380. The elements of last clear chance are (1) that the appellee was in a position of peril, (2) of which she was oblivious, (3) that the appellant was aware, or had he exercised reasonable care, would have been aware, of the appellee's peril or obliviousness and (4) that thereafter, the appellant by the exercise of reasonable care could have avoided the accident. Rankin v. Shayne Brothers, Inc., 98 App. D.C. 214, 234 F.2d 35.

The sole issue raised by appellant is the complete lack of facts to support the last element of the doctrine of last clear chance, that is, after the appellant was aware, or should have been aware, of the appellee's peril and obliviousness, that he had no opportunity to avoid the accident by the exercise of reasonable care.

Appellant does not urge that there was a lack of primary negligence on the part of appellant and conceding that in accordance with the answer to the special interrogatory No. 2 to the jury, the jury found that there was contributory negligence on the part of the appellee, the sole issue to be determined is whether there was a factual basis for submission to the jury of the doctrine of last clear chance. The law in the District of Columbia is that the last clear chance doctrine is broader than the term implies. This has been set forth in the case of Capital Transit Co. v. Garcia, 90 U.S. App. D.C. 168, 194 F.2d 162, in which case, the plaintiff recovered a judgment against the transit company for personal injuries when he walked against the side of a streetcar. In that case, the plaintiff was looking at a traffic light on his right and failed to see the streetcar approaching from his left. The question before the Court

in that case is identical to the issue here, that is, whether the case should have been submitted to the jury on the doctrine of last clear chance. This Court held:

> "Clearly, there was never a time when the operator of the streetcar could and the appellee (plaintiff) could not have avoided the accident by using care. In other words, appellant operator did not have a later chance than appellee to avoid the accident. But in the District of Columbia, the so-called last clear chance doctrine is broader than its name. . . The jury might reasonably have concluded that if the operator had used due care, he would have observed the same things, drawn the same inferences, sounded his gong in time to avoid the accident. There was ample testimony that no gong was sounded." Garcia v. Capital Transit Co., supra.

A careful reading of the Garcia case, supra, indicates that the defendant need not have the means at hand to personally avoid the accident, but if he had the means to bring the plaintiff out of her oblivion in time for her to have avoided the accident, then the doctrine of last clear chance is applicable. Further, the appellant is not relieved of his obligation by taking only one action if he reasonably should have taken additional actions to avoid the accident. The appellant must do all reasonable things to avoid the accident. In this case, he failed to sound his horn or to swerve when he had ample opportunity to do either, or both, which would have avoided the accident.

The appellant was traveling at a speed of not less than 34 miles per hour, as testified to by the expert witness. The expert testified that the speed of 34 miles per hour was indicated by the skid marks, without giving any consideration to the fact that after the point of impact, the speed of the vehicle was substantially reduced by the impact itself. However, assuming for the purposes of this argument, that the appellant was going only 34 miles per hour, he did first observe appellee in a point of danger at a point 72 1/2 feet from the point of impact. Appellant's

own testimony indicated that he could, at a point one-half block north of Yuma Street, see one-half a block east on Yuma Street and certainly should have been aware of the danger prior to 72 feet north of the point of impact. He traveled the first 37 1/2 feet in three quarters of a second, at which time, his brakes took hold and his speed began to reduce. He traveled the next 35 feet in a period of time in excess of three quarters of a second. Certainly, if he had sufficient opportunity to observe the danger and apply his brakes (with his bare feet) at a point 35 feet from the impact, his reaction would reasonably have allowed him to turn his wheel to the left and to have moved his hand into a position to blow his horn, sounding a warning to appellee who was oblivious to the danger.

Appellant contends that both vehicles approached the intersection at the same speed (approximately 25 miles per hour), and that appellee did not stop for the stop sign. If these were the true facts, the accident would not have occurred because, according to appellant's testimony, appellee continued to proceed through the intersection at the rate of 25 miles per hour while he was reducing his speed. If this were correct, appellee would have been completely through the intersection without the accident occurring.

Appellant relies in his argument upon the case of United States v. Morrow, 87 U.S. App. D.C. 84, 182 F.2d 986, an action against the United States wherein the defendant United States was found by the Court to be liable under the doctrine of last clear chance; the facts were as follows: The plaintiff and defendant operator of the United States vehicle were traveling along a six lane boulevard; plaintiff was in front and was proceeding in the middle of three lanes used by southbound traffic. She decided to drive across a paved intersectional crossway which separated the three southbound and three northbound lanes of the highway in order to reverse her direction and proceed north. As she approached the crossway, she slowed to a very moderate

speed and turned from the middle into the left lane, so as to reach the intersection and pass through it to the other side of the highway. The defendant was following in the left lane at a rather rapid rate of speed and collided with the plaintiff's car. The Court found that the defendant was guilty of negligence in failing to slow down at a slow sign and in failing to slow up upon approaching an intersection. Secondly, the Court found that the plaintiff was guilty of contributory negligence in making a left turn out of the middle lane and not giving sufficient notice of the fact of her intention to turn. The Court went on to find, however, that the defendant was responsible under the doctrine of last clear chance by stating that if the defendant driver had slowed down, as the law required him to do, he would have been able to stop in time to avoid the accident. The testimony showed that at 20 miles per hour, he could have stopped within 55 feet and there was 65 feet between him and the plaintiff at the time she commenced to turn. This Court, on appeal, reversed this and said that this was not a proper application of the doctrine of last clear chance, on the basis that it was not what speed he should have been going at the time of the accident, but what he could have reasonably done at the speed he was going. This Court, however, failed to enter judgment in favor of the defendant but remanded for a new trial in order to determine whether or not the defendant should have appreciated plaintiff's intention to turn before he reached a point only 65 feet from her and could have either brought the truck to a stop or could have directed the truck to the right of her car without colliding.

While this decision reversed a judgment for plaintiff below, it found in fact that the issue remained as to whether the defendant had the last reasonable opportunity to have avoided the accident. This is exactly the situation in the instant case. Furthermore, the case of United States v. Morrow, supra, and the case of Dean v. Century Motors, 81 U.S. App. D.C. 9, 154 F.2d 201, have been broadened by the case of Capital Transit Co. v. Garcia, supra.

As factual basis for the position that the appellant was a greater distance from the intersection at the time appellee entered, the Court is referred to the testimony of the independent witness, B. Manly Parks, who was proceeding in the opposite direction of appellee and who testified that, at the time he observed appellee entering the intersection, appellant was 250 yards back from the intersection (JA 70A, 71A). It is therefore reasonable for the jury to have concluded that appellant should have observed the danger farther back from the intersection than he actually did and, therefore, had more time to have taken avoiding action.

The case of Gay v. Augur, 97 U.S. App. D.C. 336, 231 F.2d 495, cited and relied upon by appellant, is certainly distinguishable because in that case, there was an icy street condition and the Court held that there was nothing the defendant could have done under the existing conditions to have avoided the accident. Compare the instant situation where the appellant could have swerved or blown his horn.

The case of Landfair v. Capital Transit Co., 83 U.S. App. D.C. 60, 165 F.2d 255, is certainly distinguishable from the instant case because in that case, the Court held that there was an absence of primary negligence. In Dean v. Century Motors, supra, further distinguishing element is the fact that while it was an intersection collision similar in that respect to this case, there was no testimony that either party saw the other except at a moment when they were both entering or just about to enter the intersection and there was no indication that the defendant in that case could or should have seen the plaintiff prior thereto, so as to give him time to avoid the accident.

Appellant's contention that there is no evidence in the case that there was a time after the peril arose that the appellant could have avoided the accident is not correct. There hardly ever is any direct evidence as to what the appellant was doing during the time that he realized the peril up to the point of impact. The evidence shows that

there was a minimum of at least two seconds from the time the appellant actually became aware of the danger to the point of impact, and it is probable that he should have been aware of the dangerous situation for a longer period of time, and certainly this time was sufficient for him to have taken some avoiding action, e.g., blown his horn or swerve, which do not require two seconds to accomplish.

In the case of Richardson v. Gregory, 108 U.S. App. D.C. 263, 281 F.2d 626, the Court stated that evidence was presented suggesting that the defendant negligently operated his automobile. Similarly, if defendant's evidence is to be believed, the plaintiff was not exercising the care necessary for safety. We thus need go no further in determining the propriety of the last clear chance instruction than to decide whether the evidence would have supported a finding that the defendant, in the use of ordinary care and prudence, could have seen the plaintiff's peril and avoided the accident. Citing Rankin v. Shayne, Dean v. Century Motors, supra, and Cobb v. Capital Transit Co., 79 U.S. App. D.C. 364, 148 F.2d 217, proceeding on, the court in Richardson v. Gregory, supra, stated:

> "The question is not determined solely by the defendant's testimony that he did not see the plaintiff. If the circumstances were such that the defendant should have reasonably been aware of plaintiff's danger and could have taken the proper precautions to avoid injury, the instruction requested was a correct one."

Appellant's footnote regarding the inadequacy of pretrial is certainly not justified, in view of the decision in Conlon v. Tennant, 110 U.S. App. D.C. 140, 289 F.2d 881, wherein the Court said that even though the exact words "last clear chance" were not used, the defendant was made aware of the reliance upon the doctrine. In the instant case, appellant knew that the appellee was relying on the doctrine of last clear chance and at no time made any request for a further factual elaboration of this doctrine.

CONCLUSION

There was ample evidence presented in the trial court to justify the granting of the last clear chance instruction. Appellant certainly had the means available to him after the danger arose to have avoided the accident. The jury having resolved the factual situation in favor of the appellee, the decision of the trial court should be affirmed.

Respectfully submitted,

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United States Court of Appeals

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PETITION FOR REHEARING

Comes now Betsy Ann Siegeltuch and Cooper P. Benedict, Appellees, by and through their counsel, and respectfully request the Court to grant a rehearing in this matter for the reason that the decision rendered by this Court on March 12, 1964 relies on certain factual statements which are not substantiated nor are they correct statements of the facts, and further, that the Court has apparently overlooked certain testimony in the record.

The opinion of the Court states "Frost's testimony, which is uncontradicted, was that when he was about 50 feet from the intersection and traveling at approximately 25 MPH, he became aware that Appellee's car was not coming to a stop at the arterial stop sign, . . ." This statement is incorrect and inaccurate because the Joint Appendix in this case reveals that there was contradiction as to whether or not this statement was correct. The testimony of the expert traffic analyst was to the effect that the 59 feet of skid marks laid down by Appellant Frost indicated his speed to be a minimum of 34 MPH (J.A. 38A, 39A), and that based upon the average reaction time of three-fourths of a second, the Appellant observed the danger and star-

ted to apply his brakes at a distance seventy-two and one-half feet north of the impact (J.A. 40A). This expert witness further testified that if Appellant Frost had been doing 25 MPH as he stated, he would have come to a stop 13 feet short of the point of impact, had he seen the danger at the distance of seventy-two and one-half feet north of the impact or if reaction time were eliminated that the braking distance would still have brought the vehicle to a stop three feet short of the point of impact (J.A. 41A).

A jury may reject testimony of one party and accept the testimony of an expert witness. Martin v. Perry, 134 S.E.2d 305 (Va. 1964).

There was also testimony from an independent witness, Mr. B. Manly Parks, who stated that at the time that he observed Appellee Siegeltuch enter the intersection, Appellant Frost was 250 yards back from the intersection (J.A. 70A, 71A).

It certainly therefore was a factual question for the jury to determine whether or not the Appellant Frost was doing 25 MPH and whether he was only 50 feet from the intersection at the time that he first became aware of the danger. Certainly, there was sufficient evidence upon which the jury could disbelieve the Appellant Frost and believe that he was further back and was going at a different rate of speed at the time that he first observed the danger.

In the case of Tyler v. Starke, 76 U.S. App. D.C. 42, wherein the claim was made that the instruction of Last Clear Chance was improper, the Court held that the defendant realized his danger of striking the pedestrian when approximately 40 feet away, that if his car was then being driven only 18 or 20 MPH, the question arises whether in the exercise of reasonable care, he could have (a) so controlled his automobile to avoid colliding, or (b) seeing appellant's peril and her obliviousness to it could have warned her of the danger in time to enable her to place herself in a position of safety, and there is further another question whether in the exercise of reasonable care, he should have, after be-

coming aware of the woman's danger and her obliviousness, slowed down or blown his horn. There was sufficient evidence, we think, to require the submission of these questions to the jury under proper instruction.

In the instant case, the jury has indicated by their answers to the special interrogatories found both the plaintiff and the defendant negligent. Therefore, as this Court said in the case of Richardson v. Gregory, 108 U.S. App. D.C. 263, 265:

> "We thus need go no further in determining the propriety of a last clear chance instruction than to decide whether the evidence would have supported a finding that the defendant in the use or ordinary care and prudence could have seen plaintiff's peril and avoided the accident."

In the instant case, Appellant Frost did see Appellee's peril but other than apply his brakes took no other action to avoid the accident. Appellee is not, as stated, in the opinion of this Court, merely suggesting speculative alternatives when it alleges and argues to the Court and the jury below that Appellant Frost had other alternatives available to him. Appellant was asked whether or not he blew his horn or swerved his vehicle in order to attempt to avoid this accident and his answers were in the negative (J.A. 49A). It was further brought to the attention of the jury that at the time of the accident, Appellant's permit bore a restriction requiring Appellant to operate a motor vehicle only while wearing proper glasses and that at the time of the accident, he was not so wearing them (J.A. 28A). Appellant Frost's eyes were not reexamined until approximately three months after the accident (J.A. 56A, 78A).

In the case of Baber v. Aker Motor Lines, Inc., 94 U.S. App. D.C. 211, wherein the Court said that if the driver in the exercise of due care earlier could have appreciated plaintiff's intention to turn into his path but negligently failed to do so and but for such negligence the accident could have been avoided, the last clear chance doctrine was not excluded because appreciation of plaintiff's intention was absent.

Many cases have held that the factual determination is a jury function. See Christie v. Callahan, 75 U.S. App. D.C. 133 and Baltimore and Ohio Rail Road v. Postom, 85 D.C. App. 207. The Court stated that if substantial evidence is presented which has substantiated a verdict in favor of one party or the other, the case should be left to the jury, and further that if evidence is conflicting, such conflicting evidence must be resolved by the jury and if divergent inferences may be drawn from evidence the selection of proper deduction is the function of the jury.

Counsel respectfully urges the Court to grant rehearing and reconsideration of this matter, in view of the fact that the opinion in this case completely disregards certain facts which were before the jury and upon which the jury could reasonably have found in favor of the Appellee.

WHEREFORE, Appellee respectfully urges the Court to grant a rehearing in this matter.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

CERTIFICATE OF SERVICE

I hereby certify that I have today, April 3, 1964, served two copies of the above-entitled Petition for Rehearing on counsel for Appellee, Jeremiah C. Collins, Esq., Hogan & Hartson, Colorado Building, Washington, D. C.

Washington, D. C.

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